

Thus, although the rule that the implied warranty inures to the benefit of whoever comes into rightful possession of the product is more satisfactory than the implied contract or third party beneficiary solution discussed above, it would be preferable for courts to determine how far they wish to extend a food seller's or maker's absolute liability and to apply the rule as one of tort law, rather than to couch absolute liability in terms of contracts and warranties.

Torts—Liability of Charitable Institutions for Negligence of Employees—[Illinois].—The plaintiff, an infant, was placed in a crib in the nursery of the defendant hospital together with several other infants. Due to the negligence of the members of the hospital staff, the adjoining crib, over which an improvised incubator had been placed with defective electric wiring, was set on fire, burning the inmate of the crib to death and injuring the plaintiff when the fire spread to his crib. The trial court set aside a verdict for the plaintiff, awarding him substantial damages for the personal injuries. *Held*, in affirming the trial court's action, that a charitable corporation organized not for pecuniary profit, which derives its funds mainly from public and private charity, holds them in trust for the objects and purposes expressed in its charter, and is not liable for the negligence of its servants and employees. *Maretick v. South Chicago Community Hospital*.¹

The instant case follows the view adopted by the majority of the jurisdictions that charitable corporations, such as hospitals, which are operated not for profit, are not liable to beneficiaries for personal injuries caused by the negligence of their servants or employees. The reason for the rule has been predicated on a number of different theories.² Many courts have modified this rule of absolute immunity to the extent that charitable hospitals may be liable to their patients where due care was not used in selecting competent servants and employees,³ or where the patient has paid for services rendered,⁴ or where the hospital has made an express contract to give certain accom-

¹ 297 Ill. App. 488, 17 N.E. (2d) 1012 (1938).

² (1) "trust fund" theory; (2) "public policy" theory; (3) "governmental agency" theory; (4) "waiver" theory; (5) "respondeat superior" theory; (6) "independent contractor" theory. A minority of states have refused to exempt charitable institutions from liability on the basis of any of these theories. See *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac. 354 (1923); *Glavin v. Rhode Island Hospital*, 12 R.I. 411 (1879) (overruled by statute passed by the Rhode Island legislature). For a full discussion and criticism of these various theories see: Feezer, *The Tort Liability of Charities*, 77 U. of Pa. L. Rev. 191 (1928); Ruback, *Immunity of Charitable Corporations for Negligence of Their Servants and Agents*, 12 St. John's L. Rev. 99 (1937); Seff, *Liability of Private Charitable Corporations for the Torts of Their Agents and Servants*, 2 John Marshall L. Q. 234 (1936). See also Harper, *Torts* § 294 (1934); 2 Bogert, *Trusts and Trustees* § 401 (1935).

³ For example, see *Taylor v. Flower Deaconess Home & Hospital*, 104 Ohio St. 61, 135 N.E. 287 (1922); *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318 (1925); *Morton v. Savannah Hospital*, 148 Ga. 438, 96 S.E. 887 (1918); 86 A.L.R. 491, 495.

⁴ See *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Sisters of Sorrowful Mother of Zeidler*, 82 P. (2d) 996 (Okla. 1938); *Wilcox v. Idaho Falls Latter Day Saints' Hospital*, 82 P. (2d) 849 (Idaho 1938); *Sessions v. Thomas D. Dee Memorial Hospital Ass'n*, 78 P. (2d) 645 (Utah 1938). In *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E. (2d) 28 (1937) the court held a charitable hospital liable to a pay patient when in-

modations and services and defaults on its obligation or supplies them in a negligent manner.⁵ Furthermore, the courts of most jurisdictions are in agreement that charitable organizations and hospitals are not exempt from liability for personal injuries to employees,⁶ and to third persons including guests of beneficiaries and invitees.⁷

It is well settled in Illinois by the leading case of *Parks v. Northwestern University*⁸ that a charitable institution is not liable for injuries caused by the negligence of its servants and employees since it would be contrary to the intent of the donors to divert funds held in trust for charitable purposes. Unlike the courts of most jurisdictions the Illinois Supreme Court has never taken the position that the rule does not apply where third persons or employees are injured.⁹ The Illinois Appellate Court has followed the implications of the doctrine of the *Parks* case,¹⁰ except for the *dictum* of one case¹¹ which stated that a charitable hospital might be liable if it did not exercise due care in selecting its staff. This *dictum*, however, has never been followed by subsequent appellate court decisions,¹² including, of course, the instant case which conforms closely to the strict view of immunity. A careful examination of all of these cases does not seem to reveal any significant shift in the traditional attitude of the Illinois cases.

The "trust fund" theory, when strictly applied as it is in Illinois seems to lead to most undesirable consequences. As one writer has so aptly stated,¹³ the policy of the law requiring individuals to be just before generous should be equally applicable to

jured by the negligence of the hospital's ambulance driver moving patient from hospital to his home, but only because the personal harm was caused by a mere employee. In New York if injury was caused by a member of the medical staff such as by a doctor or nurse, a charitable hospital cannot be held liable if it exercised due care in selecting its staff, since such persons are independent contractors and not employees of the hospital. See *Schloendorff v. National Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

⁵ See *Armstrong v. Wesley Hospital*, 170 Ill. App. 81 (1912); *Ward v. St. Vincent Hospital*, 39 App. Div. 624, 57 N.Y. Supp. 784 (1899); *Lavere v. Smith's Falls Public Hospital*, 35 Ont. L. Rep. 98, 26 D.L.R. 396 (1915).

⁶ See *Harper, op. cit. supra* note 2, at § 294; 2 *Bogert, op. cit. supra* note 2, at § 401.

⁷ *Ibid.*

⁸ 218 Ill. 381, 75 N.E. 991 (1905). In this case a dental student sued Northwestern University for injuries leading to the loss of an eye resulting from negligence of a professor in conducting an experiment in a laboratory. Accord: *Marabia v. Thompson Hospital*, 309 Ill. 147, 140 N.E. 836 (1923); *Hogan v. Chicago Lying-in Hospital*, 335 Ill. 42, 166 N.E. 461 (1929). In *Armstrong v. Wesley Hospital*, 170 Ill. App. 81 (1912) the court allowed recovery to a patient for personal injuries by a charitable hospital, but only on the ground that the hospital had breached an express contract.

⁹ Of course, the court has never been confronted with this phase of the question except indirectly. In *Johnston v. City of Chicago*, 258 Ill. 494, 101 N.E. 960 (1913), for example, it was held that a city was liable for the negligence of a driver of an automobile hired by the public library board who collided with the automobile of a third person, on the theory that a municipal corporation must discharge ministerial acts without negligence. The court, did not indicate how it would have decided if the defendant had been a charitable corporation instead of a municipal corporation.

¹⁰ *Simon v. Pelouze*, 263 Ill. App. 177 (1931).

¹¹ *Olander v. Johnson*, 258 Ill. App. 89 (1930).

¹² See note 10 *supra*.

¹³ *Harper, op. cit. supra* note 2, at § 294.

charitable organizations. At the present time charity is not regarded as mere almsgiving to the poor, but as an organized social institution serving needs which every community must adequately provide for. This changed view of charity requires that those agencies which society sets up for this purpose must exercise a reasonable amount of care in discharging their obligations, or be liable in damages. This is the view adopted by the majority of jurisdictions in this country and is the one which, it is believed, should be adopted in Illinois.¹⁴

The possibility of insurance coverage provides an answer to the argument that the imposition of such a liability would encompass the destruction of much needed charities, and also appears to offer a more orderly solution to the problem.¹⁵ Furthermore, it is possible that the number of accidents of a type similar to that in the instant case might be materially reduced by making charities liable as herein advocated.

¹⁴ This is the view adopted by the American Law Institute. Rest., Trusts § 402 (1935).

¹⁵ A few cases have decided that the fact that a charitable corporation has taken out casualty insurance should not affect its liability. *Levy v. Superior Ct.*, 74 Cal. App. 171, 239 Pac. 1100 (1925); *Williams, Adm'x v. Church Home for Females*, 223 Ky. 355, 3 S.W. (2d) 753 (1928); *Enman v. Trustees of Boston University*, 270 Mass. 299, 170 N.E. 43 (1930).