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The Doctrine of Charitable Immunity Does Not Bar the Suit of a Paying Patient Seeking to Recover Damages Sustained as a Result of Negligence on the Part of an Agent, Servant or Employee of a Charitable Hospital.

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of *Supervisors, Pima County v. Robinson*⁴⁸ declared unconstitutional a requirement providing for one year residence before being entitled to nonemergency public medical care. Again following *Shapiro, Alvarez v. Hackney*,⁴⁹ a Texas case, granted retroactive benefits to indigents.

As a result of *Shapiro*, the residence requirements under article 695c⁵⁰ of the Texas Public Welfare Act must be declared unconstitutional.

The Court has spoken. But on what basis may the more fundamental rights such as voting be impeded by residence requirements of any type? Has the proverbial door been opened?⁵¹ *Shapiro* has been a definite step—but in which direction and to what end is yet to be determined.

Angelo P. Parker

TORTS—CHARITABLE IMMUNITY—THE DOCTRINE OF CHARITABLE IMMUNITY DOES NOT BAR THE SUIT OF A PAYING PATIENT SEEKING TO RECOVER DAMAGES SUSTAINED AS A RESULT OF NEGLIGENCE ON THE PART OF AN AGENT, SERVANT OR EMPLOYEE OF A CHARITABLE HOSPITAL. *Villarreal v. Santa Rosa Medical Center*, 443 S.W.2d 622 (Tex. Civ. App.—San Antonio 1969, no writ).

Plaintiff, a paying patient admitted for surgery, brought an action against charitable hospital for damages allegedly sustained as a result of the negligence of the agents, servants or employees of the hospital in administering a transfusion of adulterated blood. As a result thereof, plaintiff became infected with serum hepatitis. The trial court entered a take nothing summary judgment based solely upon the hospital's defense of charitable immunity. Held—*Reversed and remanded*. The doctrine of charitable immunity does not bar the suit of a paying patient seeking to recover damages sustained as a result of negligence on the part of an agent, servant, or employee of a charitable hospital.

Generally, persons are liable for tortious conduct; immunity is the exception. Under the doctrine of *respondeat superior*, persons and busi-

Despite our inclination to uphold, if free to do so, the constitutionality of the West Virginia statutes and regulations here involved, we are compelled to follow and apply the determinations and pronouncements of the highest Court in the land. The Court has spoken.

⁴⁸ 457 P.2d 951 (Ariz. App. 1969).

⁴⁹ Civil No. 68-18-SA (W.D. Tex.). (Order entered on Sept. 30, 1969; Stipulations and Agreements, Oct. 11, 1969).

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 695(c) as amended (1967).

⁵¹ See *Kirk v. Board of Regents of Univ. of California*, 78 Cal. Rptr. 260 (Cal. App. 1969).

ness corporations respond for damage inflicted by the negligence of their agents and employees.¹ The doctrine of *respondeat superior* is essentially a policy doctrine, and the master will generally be liable for the torts of his servant committed in the scope of the servant's employment.² Thus, the rule of nonliability of a charity is an exception to the *respondeat superior* doctrine.³

The doctrine of charitable immunity was apparently first recognized in the United States in 1876 in the *McDonald v. Massachusetts General Hospital*⁴ decision that held charitable corporations immune from tort liability. In holding such a corporation immune, the court followed the rule of an 1861 English case, *Holliday v. St. Leonard*,⁵ apparently not knowing it had already been overruled by *Foreman v. Mayor of Canterbury*.⁶

Charitable immunity has long been recognized in Texas,⁷ but it is not complete immunity.⁸ The leading case in this state on the doctrine of charitable immunity is *Southern Methodist University v. Clayton* decided by the Texas Supreme Court in 1943.⁹ This opinion limited and clarified the theretofore uncertain scope of the doctrine. In *Clayton* the court held that a charitable organization is liable to an employee for injuries proximately caused by the negligence of its officers, vice-principals or agents.¹⁰ However, such organizations are not liable for injuries to others, be they beneficiaries, invitees or strangers,¹¹ in the absence of proof of negligence on the part of the charity in employing or keeping the agent whose negligence proximately caused the injuries.¹² This principle has been applied in several cases in which the

¹ *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

² *Newspapers Inc. v. Love*, 380 S.W.2d 582 (Tex. Sup. 1964); *Galveston, H. & S.A. Ry. Co. v. Henefy*, 99 S.W. 884 (Tex. Civ. App. 1907, no writ).

³ *J. Weingarten, Inc. v. Sanchez*, 228 S.W.2d 303 (Tex. Civ. App.—Galveston 1950, no writ).

⁴ 120 Mass. 432 (1876).

⁵ 11 C.B. (N.S.) 192 (1861).

⁶ L.R. 6 Q.B. 214 (1871).

⁷ A nonprofit hospital department maintained by railway company for its sick and wounded employees cannot be held liable for the negligence of the physicians it furnishes, except upon the ground of want of proper care in their selection or retention. *Galveston, H. & S.A. Ry. v. Hanway*, 57 S.W. 695 (Tex. Civ. App. 1900, writ dismissed w.o.j.).

⁸ "... the rule here is that such (charitable) institutions, with respect to patients within their walls or under their care, whether the patient be one on charity or one who pays, are liable for the negligence of their physicians, nurses and servants only when it appears that ordinary care has not been exercised in their selection and retention; and that, with respect to injuries inflicted upon third persons and employees of the institution, they come entirely within the rule of *respondeat superior*." *St. Paul's Sanitarium v. Williamson*, 164 S.W. 36, 39 (Tex. Civ. App.—Dallas 1914, writ refused).

⁹ 142 Tex. 179, 176 S.W.2d 749 (1943).

¹⁰ *Hotel Dieu v. Armendarez*, 210 S.W. 518 (Tex. Comm'n App. 1919, judgment adopted); *Armendarez v. Hotel Dieu*, 145 S.W. 1030 (Tex. Civ. App.—San Antonio 1912, no writ).

¹¹ *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S.W.2d 749 (1943).

¹² *St. Paul's Sanitarium v. Williamson*, 164 S.W. 36 (Tex. Civ. App.—Dallas 1914, writ refused).

alleged negligence of a nurse caused injury to a patient.¹³

In cases subsequent to *Clayton*, two further refinements have been placed on the doctrine: (1) the charity is liable to the injured party if, through negligence, improper equipment for treatment or service is provided and causes an injury,¹⁴ and (2) the purchase of liability insurance does not act as a waiver of immunity.¹⁵

"Some twenty-five states have now abrogated the doctrine."¹⁶ In recent years, when the issue has come before a court as a matter of first impression, the doctrine has been consistently rejected.¹⁷ Although not the first case in which the immunity doctrine was discarded, *President and Directors of Georgetown College v. Hughes*¹⁸ appears to be the most cited in expressing the reasons for the doctrine's loss of utility:

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.¹⁹

Texas courts have justified the doctrine on the grounds of public policy,²⁰ apparently with the underlying rationale that one should not bite the hand that feeds him. Both the doctrine of *respondeat superior* and its exception, the doctrine of charitable immunity, are based on public policy; the court in *Clayton* weighed the public policy considerations and determined that the benefits derived by the public from charities outweighed the individual loss that might be incurred by an injured person deprived of recourse for a tortious act.²¹ The economic reasons existing at the time of *Clayton* are not prevalent today. Many modern charities are large business corporations with vast assets. The ready availability of liability insurance, the cost of which may be borne by all the recipients of the institutions' services or facilities, could provide the needed protection against liability. It is

¹³ *Steele v. St. Joseph's Hospital*, 60 S.W.2d 1083 (Tex. Civ. App.—Ft. Worth 1933, writ ref'd); *Enell v. Baptist Hospital*, 45 S.W.2d 395 (Tex. Civ. App.—Galveston 1932, writ ref'd); *Baylor University v. Boyd*, 18 S.W.2d 700 (Tex. Civ. App.—Dallas 1929, no writ); *Barnes v. Providence Sanitarium*, 229 S.W. 588 (Tex. Civ. App.—San Antonio 1921, writ dism'd); *St. Paul's Sanitarium v. Williamson*, 164 S.W. 36 (Tex. Civ. App.—Dallas 1914, writ ref'd).

¹⁴ *Baptist Memorial Hospital v. Marrable*, 244 S.W.2d 567 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.).

¹⁵ *Baptist Memorial Hospital v. McTighe*, 303 S.W.2d 446 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.).

¹⁶ *Villarreal v. Santa Rosa Medical Center*, 443 S.W.2d 622 (Tex. Civ. App.—San Antonio 1969, no writ).

¹⁷ *Id.*; see Annot., 25 A.L.R.2d 29 (1952).

¹⁸ 130 F.2d 810 (D.C. Cir. 1942).

¹⁹ *Id.* at 827.

²⁰ *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S.W.2d 749 (1943).

²¹ *Id.*

more realistic to denominate most of the institutions "non-profit" rather than "charitable."²²

It is difficult, for example, to consider a person who pays from \$20 to \$50 per day for a hospital room to be the object of charity and entitled to no protection from negligent acts of the employees. . . .²³

In 1966, the Texas Supreme Court had an opportunity to review the doctrine in light of modern conditions. In *Watkins v. Southcrest Baptist Church*,²⁴ the court reaffirmed the doctrine, but rather than justify the holding on the basis of public policy, as had been done in past decisions, charitable immunity was upheld because charities had come to rely on *Clayton* and had not taken steps to protect themselves against prosecution. The opinion indicated that if changed conditions demanded abolition, such should be effected by the legislature, not the judiciary.

Notwithstanding the decision, the court was divided in such a manner as to cast a degree of doubt as to how it would deal with the question if it were to arise again. A summary of the individual opinions set out in *Watkins* is helpful in attempting to understand the decision in the *Villarreal* case. Justices Griffin, Hamilton, and Pope joined in the majority opinion written by Justice Norvell. It should be noted that this opinion was not so much an approval of the doctrine of charitable immunity as it was of the doctrine of *stare decisis*.

Justice Walker concurred in the affirmance, but said that he would announce that the doctrine would not be recognized in cases arising thereafter.²⁵

Justice Greenhill, concurring, believed that the court should declare that in cases arising after the decision became final, the court would feel free to re-examine the doctrine, and that *Watkins* should serve as a *caveat* to people and institutions.²⁶ Justice Steakley joined in this opinion.

²² For a well-reasoned and well-documented discussion of why charitable immunity should be re-evaluated in Texas, see Conners, *Charity Begins at Home*, 3 S. TEX. L.J. 225 (1958); contra, Sister Ann Joachim, *Immunity Doctrine in the South West*, 4 S. TEX. L.J. 232 (1959).

²³ Justice Greenhill's concurring opinion, *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530 (Tex. Sup. 1966).

²⁴ 399 S.W.2d 530 (Tex. Sup. 1966).

²⁵ Justice Walker apparently would apply the procedure for overruling termed the "Sunburst" doctrine, which was held constitutional in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932). Under the "Sunburst" doctrine, precedent would be adhered to in the particular case, but the court would dogmatically announce that the rule will be different hereafter, and state what the new holding shall be.

²⁶ Justice Greenhill states that he is impressed with arguments that the doctrine of charitable immunity may now be unsound, but he feels it proper to give some warning that precedent may be reconsidered. The procedure for overruling that he favors does not go

Chief Justice Calvert, joined by Justice Smith, felt the doctrine should be abolished *instanter* without distinction as to the nature or character of the various charitable organizations.

There were, then, four opinions written in *Watkins* and only four justices upheld *Clayton*. In view of these opinions and the subsequent change in the personnel on the court,²⁷ it may well be that the court would hold differently were the question before it today.

Under *Watkins*, as interpreted by the San Antonio Court of Civil Appeals,²⁸ Texas courts are no longer bound by the *Clayton* rule if the cause of action arose subsequent to the finality of the *Watkins* decision.

It is our duty as an intermediate court, in our judicial system, to follow the decision of our Supreme Court. (Omitting citation) Clearly, this would be our duty if a majority of the members of the Supreme Court in *Watkins* had followed or reaffirmed the *Clayton* rule of charitable immunity.²⁹

If this is the true intention of the *Watkins* decision, then this court is merely adhering to the doctrine of *stare decisis*. For this writer to presuppose whether other courts of civil appeals will interpret the intent of the supreme court in the same manner would be mere conjecture.³⁰

The immunity applies to all the various types of charitable organizations in the state. The possibility of a doctrinal checkerboard arising in Texas presents itself. With the doctrine not entirely abrogated and under decisions and interpretations of the several courts, some Texas courts may give immunity to churches and not to hospitals,³¹ others

nearly so far as the "Sunburst" doctrine in that he does not announce what the new holding would be, but merely that he would not be bound by precedent upon re-examination. Because he would not overrule the doctrine completely, as would Justice Walker and the dissenting Justices, it may be fairly implied that he feels it has merit in some circumstances and would only overrule it in the situation when changed conditions would warrant it.

²⁷ Justices Norvell and Griffin are no longer on the court, having been replaced by Justices McGee and Reavley.

²⁸ *Villarreal v. Santa Rosa Medical Center*, 443 S.W.2d 622 (Tex. Civ. App.—San Antonio 1969, no writ).

²⁹ *Id.*

³⁰ The Amarillo Court of Civil Appeals feels that either the supreme court or the legislature can change the doctrine of charitable immunity, but that an intermediate appellate court cannot. As to the *Watkins* decision, the court feels it is obligated to follow the majority of the divided supreme court. *Tunnell v. Otis Elevator Company*, 400 S.W.2d 781 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.); referring to *Watkins*, ". . . it is indicated that the court may hereafter abolish the doctrine, but until then, following the majority in *Watkins*, we hold that appellee in this case (charitable hospital) is immune . . ." *Dillon v. Greenville Hospital Authority*, 404 S.W.2d 956 (Tex. Civ. App.—Dallas 1966, no writ).

³¹ "There is an obvious distinction between a church on one hand and a hospital on the other. Churches are largely dependent upon volunteer help to carry on many of their functions. Actually, the church or its vice principals are not positioned to exercise an effective control over those who carry out the details incident to the major portion of the church's works and ministry." *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530, 533 (Tex. Sup. 1966).