Duquesne Law Review

Volume 3 | Number 1 Article 7

1964

The Charitable Immunity Doctrine in Pennsylvania: Death Knell

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COMMENTS

THE CHARITABLE IMMUNITY DOCTRINE IN PENNSYLVANIA: DEATH KNELL

In the face of an overwhelming trend to eliminate the charitable immunity doctrine,[1] the Pennsylvania Supreme Court has consistently refused to abolish the doctrine[2] it created back in 1888.[3] The purpose of this paper is to forecast the future of the charitable immunity doctrine in Pennsylvania by analyzing cases in other areas where the policy arguments advanced were much the same as those raised for the doctrine of charitable immunity. Professor William L. Prosser notes that courts are in full retreat on the charitable immunity doctrine, and predicts its possible extinction within two decades.[4] The doctrine as established in this state and in this country was based upon judicial error because reliance was placed upon overruled authority in England.[5] The charitable immunity doctrine has nevertheless remained law in Pennsylvania until the present time. The Pennsylvania Supreme Court last faced the doctrine in 1961 in *Michael v. Hahnemann Medical College and Hospital.*[6] At that time the court held,

> If the doctrine of charitable immunity is . . . no longer suited to the times and should be dispensed with, the proper

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1. PROSSER, TORTS §127 (3d ed. 1964). The author states that prior to 1942 only two or three states rejected the charitable immunity doctrine. Since then twenty-one jurisdictions have completely repudiated the charitable immunity doctrine, and only nine jurisdictions still confer almost complete immunity. The remaining jurisdictions have retained it to a modified degree. For example, Ohio and Washington terminated it to hospitals only.

2. Michael v. Hahnemann Medical College and Hospital of Philadelphia, Inc., 404 Pa. 424, 172 A.2d 769 (1961).

3. Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888).

4. PROSSER, TORTS §127 (3d ed. 1964).

5. Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888), relied upon Feoffees of Heriot's Hospital v. Ross, 12 C & F 506, 8 Eng. Rep. 1508 (1846), which in turn relied upon dicta in Duncan v. Findlater, 6 C & F 894, 7 Eng. Rep. 934 (1839), which were expressly overruled in England by Mersey Docks Trustees v. Gibbs, 11 H. L. Cas. 686, 11 Eng. Rep. 1500 (1866). The authority relied upon by Pennsylvania was overruled twenty-two years before it became established in this state.

6. *Supra* note 2.

> way to accomplish that end is prospectively by legislation and not retroactively by judicial ukase. . . . it is the legislature that can completely declare and promulgate public policy and not the courts. It is to be hoped . . .

the attempts to eliminate the doctrine of charitable immunity ". . . will assume a state of quiescence so far as further insistent court action is concerned. Perhaps that is too much to hope for."[7] In order to fortify the crumbling walls of the charitable immunity doctrine, which sister states are deserting, the Pennsylvania Supreme Court laid its second emphasis upon stare decisis. Citing *McDowell v. Oyer,*[8] the Court held that stare decisis is absolutely necessary to any system of jurisprudence,

> It is this law which we are bound to execute, and not any 'higher law', manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary.[9]

In 1888 the Pennsylvania Supreme Court established the doctrine of charitable immunity based upon the trust fund concept[10] and in later cases cited the inapplicability of the respondeat superior doctrine to charities[11] as another basis for immunity. These views are attacked well by most eminent authority.[12] But both the trust fund

7. *Id.* at 426, 427, 172 A.2d at 770.

8. 21 Pa. 417, 423 (1853).

9. *Supra* note 2 at 428, 172 A.2d at 771.

10. *Supra* note 3.

11. Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A.2d 59 (1946).

12. PROSSER, TORTS §127 (3d ed. 1964). The trust fund concept's "weakness lies in the fact that it is contrary to the various decisions which have evolved methods of making other trust funds responsible for torts committed in administering the trust, and that such funds would not be exempt in the hands of the donor himself, he can scarcely have the power, even if it were true that he had even the intention, to confer such immunity upon the object of his bounty. A further fault in the justification is that it proves too much, and is inconsistent with . . . holding charities liable for damages for breach of contract, or for some kinds of negligence."

Professor Prosser then attacks the inapplicablility of respondeat superior doctrine. It is based upon the fact that they derive no gain from their operation. But the theory of respondeat superior was never based upon profit elsewhere. It is based upon employment, direction and control in furtherance of a business. The public policy argument is exaggerated. There is no evidence that charities are stifled by tort liability in states denying the immunity especially with liability insurance today.

and respondeat superior doctrines find their only basis in public policy where it stems from a fear of placing a run upon the treasuries of charity. The court seems to have realized this in the *Michael* case when it laid its emphasis upon public policy and stare decisis.

The purpose of this comment is to evaluate recent case law to determine what the Pennsylvania Supreme Court will do when it is again confronted with this doctrine. We'll look to recent cases outside the charitable immunity area involving public policy and stare decisis.[13]

Perhaps the first point to notice is that the majority of the court in the *Michael* case was composed of Chief Justice Calvin Alvin Jones and Justices Benjamin R. Jones, John C. Bell, Jr. and Curtis Bok. Two of these four justices wrote concurring opinions. Justice Bell concurred adding that the doctrine is a necessity to keep charities from being depleted and making it a state function. The second concurring opinion was written by Justice Bok who wanted to overrule the doctrine of charitable immunity on a prospective basis and joined the majority because the minority would have applied it retroactively. The minority of the court was composed of Justices Michael A. Musmanno, Herbert B. Cohen and Michael J. Eagen. Justice Musmanno's minority opinion was similar to the majority opinion in *President and Director's of Georgetown College v. Hughes,*[14] challenging every basis upon which charitable immunity could rely. At the present time only five of the justices who decided the *Michael* case are sitting on this court. They are the three dissenters (Justices Musmanno, Cohen and Eagen) and two members of the majority (Justice Bell, now Chief Justice, and Justice Benjamin R. Jones). The two new justices will probably be the determining factor when this doctrine is again before the court. These two new justices are Henry X. O'Brien and Samuel J. Roberts.

Since these two justices joined the court they have participated in a number of cases involving public policy and stare decisis, the same issues that were involved in the *Michael* decision. The collateral cases chosen for comparison are *Olin Mathieson Chemical Corporation v. White Cross Stores, Inc. No. 6,*[15] *Doyle v. South Pittsburgh Water Company*[16] and *Malter v. South Pittsburgh Water Company and Whitehall Borough.*[17] In *Mathieson* the issue was the constitution-

13. The public policy-stare decisis argument in this area apparently was first expounded in Bond v. Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).

14. 130 F.2d 810 (U.S. App. D.C. 1942).

15. 414 Pa. 95, 199 A.2d 266 (1964).

16. 414 Pa. 199 (1964).

17. 414 Pa. 231, 198 A.2d 850 (1964).

ality of the Fair Trade Act[18] as applied to non-signers of "Fair Trade" price maintenance contracts. The defendant conceded that he had violated the statute,[19] but challenged its constitutionality. The court began its opinion, after citing its disfavor of fair trade laws, by restricting its inquiry to ". . . the legal aspects involved. It is not for us to enunciate public policy. That responsibility rests with the legislature and is for that body alone to resolve."[20] This appears consistent with *Michael,* but after finding the act unconstitutional the court had occasion to say:

> It may be advanced that despite the above conclusion [unconstitutionality], we should permit the ruling in *Burche*[21] . . . to stand in deference to the principle of Stare Decisis.
>
> While it is true that great considerations should always be accorded precedent, especially one of long standing and general acceptance, it doesn't necessarily follow that a rule merely established by precedent is infallible. Moreover, the courts should not perpetrate error solely for the reason that a previous decision although erroneous, has been rendered on a given question. This is particularly true where no fixed rights of property are involved or where great injustice or injury will result by following the previous erroneous decision. If it is wrong it should not be continued. Judicial honesty dictates corrective action.[22]

Taking this at its plain meaning the court has stated its intent to require stare decisis to yield, regardless of its perpetuity, where the reason for the law has been proven in error. These are dangerous words to those who claim stare decisis and public policy as foundations for charitable immunity.

In this case, the majority was composed of the three dissenters in the *Michael* case (Justices Michael A. Musmanno, Herbert B. Cohen and Michael J. Eagen), plus the two new justices (Justices Henry X. O'Brien and Samuel J. Roberts). The minority was composed of

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18. 73 P.S. §8.

19. White Cross willfully and knowingly sold Squibb products at less than the price required by the manufacturer Olin Mathieson. While White Cross had not agreed on price with Olin Mathieson, the Pennsylvania Fair Trade Act required it to sell at no less than the minimum price agreed upon by Olin Mathieson and any other outlet. See 73 P.S. §8.

20. Olin Mathieson Chemical Corp. v. White Cross Stores, *supra* note 15 at 98, 199 A.2d at 267.

21. Burche Co. v. General Electric Co., 382 Pa. 370, 115 A.2d 361 (1951). This case held the same statute to be constitutional.

22. *Supra* note 15 at 100, 199 A.2d at 268.

the two remaining justices from *Michael* (Justices Benjamin R. Jones and Chief Justice John C. Bell). Chief Justice Bell, citing the important aspect of the case, stated his personal dislike for fair trade but ". . . it is for the Legislature . . . to enunciate public policy in this field. Nevertheless, today, this Court once again treats the principle of stare decisis as virtually obsolete"[23] in reference to overruling a statute sustained generally since 1935 and constitutionally since 1955. Justice Benjamin R. Jones in dissent felt that it was an economic attack upon fair trade properly addressable to the legislature and not the court. The authors of a Duquesne University Law Review article[24] establish a case of early dislike and restrictions laid upon this statute by judges as a matter of public policy.

> Thus, since the days of the enactment of Fair Trade, the judicial branch of our government has limited the Act's application. The frequency with which todays highest state courts are eliminating the Act indicates a definite dislike of the economic effects of such legislation. In Pennsylvania, since the Act was first declared constitutional, the courts have continued to limit its use citing for their reason the economic unsoundness of imposing restrictions on competition.[25]

The court in *Mathieson* renounces stare decisis as a means of perpetuating error where it can find an adequate reason for doing so, even to find a statute unconstitutional where there are definite overtones of strong economic dislike. The flavor of public policy is strong when the court decides that the child of the depression, having reached thirty years of age, must die having served its purpose. Having resolved the court's position on stare decisis and seeing the undercurrent of public policy, let us go on, reserving the argument that this case differs from the charitable immunity cases because of the substantial property rights involved in the charitable immunity cases.

Turning to the *Doyle* and *Malter* decisions, we find Justices Michael A. Musmanno, Henry X. O'Brien, Samuel J. Roberts and Michael J. Eagen in majority, with Justices Benjamin R. Jones and Herbert B. Cohen in dissent. These decisions place case law established as early as 1871 in serious danger of being overruled.[26] In both cases build-

23. *Supra* note 15 at 102, 199 A.2d at 269.

24. The Demise of Fair Trade in Pennsylvania: *A Study in Judicial Disenchantment,* 2 Duquesne U. L. Rev. 297 (1964).

25. *Id.* at p. 303.

26. Grant v. Erie, 69 Pa. 420, 8 Atl. 272 (1871).

ings were destroyed by fire because of improperly maintained water hydrants, which could have been averted but for this condition.[27] The Pennsylvania Court reasons, the case is

> . . . squarely within the rule that where a party to a contract assumes a duty to the other party to a contract, and it is foreseeable that a breach of that duty will cause injury to some third person not a party to the contract, the contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm.[28]

In *Malter* the municipality was held liable for failure to maintain the system.

> Did the act of negligence occur during the performance of a governmental or a proprietary function? Once it is determined that the negligence occurred while the municipality was engaged in a proprietary function, liability inevitably attaches.[29]

These decisions place Pennsylvania with the minority of jurisdictions but with the noted legal commentators. *Moch v. Rensselaer Water Co.*,[30] the case cited as the foundation for non-liability of water companies and municipalities in these circumstances has been severely criticised because of its legal analysis, but lauded solely on public policy grounds.[31] The Pennsylvania Supreme Court distinguished *Malter* and *Doyle* from *Moch* upon their facts, but rejected *Moch's* policy considerations. It also attempts to distinguish it from all other Pennsylvania cases, where supplying water was discretionary and nothing was done to carry it out. But the Pennsylvania Court criticizes statements to this effect in the *Moch* case, such as "The failure . . . to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong."[32] Justice Michael A. Musmanno, the author of the opinion, emphasizes,

> Something possibly could be said about the practicality of shielding water companies from heavy financial burdens in their infancy . . . but water companies have left their cradles long ago and must accept adult responsibilities as all other public utilities are required to shoulder it.[33]

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27. Since defendants demurred in the lower court, the allegations in the complaint were accepted as true.

28. *Supra* note 16 at 207.

29. *Supra* note 17 at 237, 198 A.2d at 853.

30. 247 N. Y. 160, 159 N.E. 896 (1928).

31. See 13 Cornell L. Q. 616 (1928), PROSSER, TORTS §99 (3d ed. 1964).

32. *Supra* note 16 at 214.

33. *Id.* at 216.

To continue such a policy of immunity to water companies, would ". . . invite progressive inattention and indifference to protection against the scourge of flame and incendiary invasion."[34] The court found the policy of the law requiring,

> Any legal entity which commits a wrong is bound by law to restore the injured person to status quo . . . regardless of what the malfeasant may have to undergo in accomplishing that act of justice,[35]

was more important than the increased costs resulting therefrom. The court asked why water companies should not protect themselves by *insurance* as do other businesses (emphasis added). Can it be then that the court will not require that stare decisis depend upon an adequate basis, other than self-perpetuation, and that the public policy argument of charitable immunities is subject to attack on its basic premises. An important factor to be noted in *Malter* and *Doyle* is that Justice Henry X. O'Brien has joined with Justice Michael A. Musmanno in this opinion, and they have placed insurance in the picture as a consideration in imposing liability.[36]

The issue then becomes: will liability break charities; scare away contributors; and have charities relied upon precedent to their possible detriment? To quote from Justice Musmanno in *Doyle,*

> Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible to their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads could be built; if municipalities were to be financially liable for damage done by their motor vehicles, their treasuries would be depleted. Nevertheless liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.[37]

In this light, there is no evidence that liability has broken charities or chased away contributors in those states eliminating charitable

34. *Id.* at 217.

35. *Id.* at 216.

36. Slidekum v. Animal Rescue League of Pittsburgh, *supra* note 11, refused to consider insurance as a factor in charitable immunity cases.

37. *Supra* note 16 at 218, 219.

immunity. It did not bankrupt businesses nor chase away contributors, nor is there any authority to show it has or will do so to charitable institutions. Reliance on past case law has not deterred courts in the past from their duties to apply fundamental principles, nor did it do so in the *Doyle* and *Malter* cases. With the obvious change in the court's attitude to the stare decisis and public policy argument, warnings given by noted authorities and the shrinking strength of the majority in charitable immunity cases, it is hard to believe that a charitable institution would rely upon the charitable immunity doctrine and disregard liability insurance.[38]

The Pennsylvania Supreme Court has said in upholding a previous decision, "the doctrine [of stare decisis] is a salutary one, and should not be departed from where the decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it."[39] Justice Michael A. Musmanno in the *Doyle* case quoted Chief Justice Vanderbilt of the Supreme Court of New Jersey[40] as saying,

> Negligence law is common law, and the common law has been molded and changed and brought up to date in many other cases. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it . . .
>
> We act in the finest common law tradition when we adopt and alter decisional law to produce common sense justice.[41]

Compare this with Justice Cohen's dissenting opinion in the *Michael* case,

> The doctrine of charitable immunity was wrong when first enunciated and is wrong now. We should not perpetuate the wrong by relegating to the legislature our responsibility to correct our own mistakes; nor should we hide behind our former decisions made against common justice and the general reason of mankind.[42]

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38. See 24 U. Pitt. L. Rev. 380 (1962). "Although the future is not clear because of changes in the personnel of the court, [speaking of charitable immunity] hospitals have been duly warned to take out liability insurance . . ."

39. Colonial Trust Co. v. Flanagan, 344 Pa. 556, 561, 25 A.2d 728, 730 (1942).

40. Reimann v. Monmouth Consolidated Water Co., 9 N.J. 34 (1942). (dissenting opinion of Vanderbilt, C. J.).

41. *Supra* note 16 at 219, 220.

42. *Supra* note 2 at 474, 172 A.2d at 794. (concurring opinion of Cohen, J.).

Of importance and certain to be raised at the next hearing of this issue will be the most recent Oregon Supreme Court decision on charitable immunity. The Oregon legislature had failed to pass a bill eliminating charitable immunity, which has also occurred in Pennsylvania. In *Hungerford v. Portland Sanitarium,*[43] this point was raised along with the case of *Landgraven v. Emanuel Lutheran Charity Board,*[44] which had relied upon the same reasoning as the Pennsylvania Supreme Court did in *Michael.* But the court reiterated the proposition that courts had evolved the doctrine of tort liability without legislative aid and where the legislature is equivocal, the court will act as justice requires. Certainly it can not be emphatically stated, as the concuring opinion of Justice Bell did in *Michael,*[45] that the failure to pass a particular bill in the legislature implies legislative agreement with the law as it is.

If the court applies the language in *Mathieson, Doyle* and *Malter* it is inevitable that charitable institutions will be stripped of their immunity from tort liability. When stare decisis and public policy are given the same weight in charitable immunity cases as it is in these other areas, the charitable immunity doctrine will be extinct in Pennsylvania.

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RIGHTS OF SOCIETY VS RIGHTS OF THE INDIVIDUAL IN THE ADMINISTRATION OF CRIMINAL LAW

Since early in the Twentieth Century, the trend in the administration of criminal law, both in state and federal courts, has been toward increased protection of the rights of the individual. At the same time, and perhaps as a result thereof, there has been an attendant decrease in the police powers of federal, state and local law enforcement agencies.

The vexing problem posed by this shift in emphasis from protection of property rights to the present day atmosphere of strengthened human rights, is illustrated by the rapidly rising crime rate in the United States. In 1961, 1,926,090 serious crimes were committed, topping the

43. 384 P.2d 1009 (1963).

44. 203 Ore. 489, 280 P.2d 301 (1955).

45. *Supra* note 2. (concurring opinion of Bell, J.).