SMU | Dedman School of Law

SMU Law Review

Volume 20 | Issue 1 Article 8

January 1966

# Charitable Immunity in Texas Reconsidered

Teddy M. Jones Jr.

# NOTES

## Charitable Immunity in Texas Reconsidered

### I. Foundations of Charitable Immunity Doctrine

The charitable immunity doctrine absolves charitable institutions from liability for most torts. The doctrine does not deny the existence of a tort, but it prevents recovery out of a charity's assets. The first American cases granting this immunity were *McDonald v. Massachusetts General Hospital*[1] and *Perry v. House of Refuge*,[2] which relied upon previously overruled English cases.[3] Thus, the charitable immunity doctrine that was established in the United States was based upon faulty precedent. Later application of the doctrine resulted in the granting of immunity to a wide range of "charitable" organizations.[4]

Various theories have been used to support the charitable immunity doctrine. The most important of these is the "trust fund theory." The *McDonald* and *Perry* cases, in adopting this theory, drew a parallel from the law of trusts and treated charitable assets as a trust fund which the donor intended exclusively for charitable use. They held that use of a charity's assets to pay a tort judgment would frustrate donative intent and would deprive the public of the charity's benefits.[5] By considering the capital of a charity to be an inviolable trust,[6]

[1] 120 Mass. 432 (1876).

[2] 63 Md. 20 (1885).

[3] McDonald v. Massachusetts General Hospital, 120 Mass. 432 (1876), using as authority the English case of Holliday v. Vestry of the Parrish of St. Leonard, 11 C.B. (n.s.) 192, 142 Eng. Rep. 769 (1861) which, in turn, relied upon *dictum* from Duncan v. Findlater, 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839). *Duncan* was overruled by Mersey Docks Trustees v. Gibbs, 1 H.L. 93, 11 Eng. Rep. 1500 (1866); while *Holliday* was overruled by Foreman v. Mayor of Canterbury, 6 Q.B. 214 (1871). Perry v. House of Refuge, *supra* note 2, cited as authority Heriot's Hosp. v. Ross, 12 Cl. & Fin. 507, 8 Eng. Rep. 1508 (1846); Heriot's Hosp. was also repudiated by Mersey Docks Trustees v. Gibbs, *supra*.

[4] See Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872 (1937); Texas Cent. R. Co. v. Zumwalt, 103 Tex. 603, 132 S.W. 113 (1910); Goelz v. J. K. & Susie L. Wadley Research Institute & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961) *error ref. n.r.e.;* Scott v. Wm. M. Rice Institute, 178 S.W.2d 156 (Tex. Civ. App. 1944) *error ref.;* Baylor University v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929). "Charity" does not imply, necessarily, an institution which renders service without compensation from its beneficiaries. Nor does the term imply that an institution must open its doors to all persons seeking the benefits of its ministry. The fact that a charity actually operates at a profit in a particular phase of its service has been held not to disqualify the charity from immunity. Governmental branches, even though a fee is charged for services rendered, have been held to be charitable institutions and thus entitled to immunity if the operation in question is non-profit and charitable in nature. Private companies and corporations operated for profit which set up charitable corporations or administer charitable trusts for the benefit of their employees are generally granted immunity in the operation of such trusts or divisions. See cases cited *supra*.

[5] Cases and text cited note 3 *supra*.

[6] Eads v. Young Women's Christian Ass'n, 325 Mo. 577, 29 S.W.2d 701 (1930).

the theory confers upon charitable organizations and trustees a protection from fund dissipation not enjoyed by private trusts.[7]

The "waiver" theory rests upon the proposition that a beneficiary of a charity impliedly waives the right to bring an action against it.[8] By accepting the benefits and services rendered by the organization, the beneficiary is held to forfeit his right to enforce a tort claim against his benefactor.

A broader approach taken by courts is the "public policy" argument of encouraging benevolent groups by granting immunity. Because charities benefit the general public, courts often hold that encouraging their activity is of greater import than compensating the loss suffered by a few individuals.[9] Fear of discouraging prospective donors, concern for the difficulty involved in securing donations, and a disinclination to subject charities to litigation costs are all relevant considerations in a public policy immunity base.

Wherever the doctrine is recognized, another means by which protection is often granted is the refusal to apply *respondeat superior.*[10] Since charities derive no pecuniary benefit from the acts of their servants and agents, the *respondeat superior* liability usually resting upon a master is not imposed upon charitable organizations. Apparently, the public policy considerations holding a master liable for the torts of his servant have been felt to be less strong than those absolving a charity from tort liability.[11]

## II. Limitations and Recent Developments

### A. *Limits Of The Immunity*

Exceptions to complete immunity are often made even by jurisdictions which adhere to the basic doctrine. If injuries occur while the charity is engaged in a purely commercial endeavor, compromising its charitable or non-profit purpose, recovery will sometimes be allowed. This result follows even though the net profit from the commercial enterprise would be added to the general funds of the charity.[12]

[7] Larson, *Liability of Trustees in Texas,* 3 Sw. L.J. 135, 140-53 (1949). Private trustees are not exempt from liability for torts committed in trust administration, and a private trust *res* may be reached for satisfaction of tort liability. Also, as no immunity existed in the donor, he can hardly be said to have the authority to confer such a benefit upon the receiving institution. *Ibid.*

[8] Powers v. Massachusetts Homeopathic Hosp., 109 Fed. 294 (1st Cir. 1901), *cert. denied,* 183 U.S. 695 (1902). "[I]f a suffering man avails himself of their charity, he takes the risks of malpractice. . . ." *Id.* at 304.

[9] Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).

[10] 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); Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943).

[11] See cases *supra* note 10.

[12] Eiserhardt v. State Agric. & Mech. Society, 235 S.C. 305, 111 S.E.2d 568 (1959).

If an otherwise charitable institution operates an office building,[13] a paid parking lot,[14] a student health insurance plan,[15] or any other profit-making activity unconnected with its main purpose, it will usually be liable for torts arising from that phase of its operations.

Additional exceptions to the charitable immunity doctrine arise in a variety of situations. Charity hospitals may be liable for injuries caused by the negligence of their agents or servants if the negligence can be classified as "administrative."[16] Administrative negligence as used here is the lack of due care in the selection or supervision of employees. Courts in some states allow paying patients in hospitals to recover for negligently caused injury but deny recovery to patients who receive hospital services on a non-paying basis.[17] In some jurisdictions the waiver theory is modified to allow "strangers" to recover from the charity since such persons do not waive their right to hold the charity liable by receiving benefits from it.[18] A final partial limitation is the policy of allowing recovery in tort where a charity has liability insurance in force.[19]

[13] Blatt v. George H. Nettleton Home for Aged Women, 275 S.W.2d 344 (Mo. 1955).

[14] Eiserhardt v. State Agric. & Mech. Society, 235 S.C. 305, 111 S.E.2d 568 (1959).

[15] Grueninger v. President & Fellows of Harvard College, 343 Mass. 338, 178 N.E.2d 917 (1961).

[16] See, *e.g.*, Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 P. 385 (1916). *Cf.* Berg. v. New York Society for the Relief of the Ruptured and Crippled, 286 App. Div. 783, 146 N.Y.S.2d 548 (1955), *overruled,* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957), Note, 12 Sw. L.J. 244 (1958). See generally Hortz, *The Status of the Doctrine of Charitable Immunity in Hospital cases,* 25 OHIO ST. L.J. 343 (1964). Before the distinction between "administrative" and "medical" negligence was abandoned in Bing v. Thunig, *supra,* the New York courts had difficulty in applying the test. Attempts to classify negligent acts as either medical or administrative led to the drawing of illusory distinctions. *Compare* Iacono v. New York Polyclinic Med. School & Hosp., 296 N.Y. 502, 68 N.E.2d 450 (1946) (placing improperly capped hot water bottle on patient's body is administrative) *with* Sutherland v. New York Polyclinic Med. School & Hosp., 298 N.Y. 682, 82 N.E.2d 583 (1948) (keeping hot water bottle too long on patient's body is medical). *Compare* Necolayff v. Genesee Hosp., 296 N.Y. 936, 73 N.E.2d 117 (1947) (giving blood transfusion to wrong patient is administrative) *with* Berg v. New York Society for the Relief of the Ruptured and Crippled, 1 N.Y.2d 499, 154 N.Y.S.2d 455, 136 N.E.2d 523 (1956) (administering the wrong blood to the right patient is medical). *Compare* Peck v. Charles B. Towns Hosp., 275 App. Div. 302, 89 N.Y.S.2d 160 (1949) (using improperly sterilized needle for hypodermic injection is administrative) *with* Bryant v. Presbyterian Hosp., 304 N.Y. 538, 110 N.E.2d 391 (1953) (improperly administering a hypodermic injection is medical). For a discussion of the charitable immunity rule of hospital cases in relation to the "borrowed servant" doctrine, see Note, 19 Sw. L.J. 179 (1965).

[17] Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915).

[18] St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); Basabe v. Salvation Army, 35 R.I. 22, 85 A. 120 (1912); Weston Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921).

[19] Cox v. De Jarnette, 104 Ga. 664, 123 S.E.2d 16 (Ct. App. 1961); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Howard v. South Baltimore Gen. Hosp., 191 Md. 617, 62 A.2d 574 (1948); Vanderbilt Univ. v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938).

> [T]here are several . . . reasons why we think there should be no immunity from tort liability accorded to a charitable institution to the extent that it may be covered by a liability insurance policy. These . . . are: (1) The purpose and intent of the charitable institution in securing a liability policy obviously

### B. *Impetus For Change*

In recent years, the entire doctrine of charitable immunity has come under fire. In 1942, the Court of Appeals for the District of Columbia in *President and Directors of Georgetown College v. Hughes*[20] examined, analyzed, and then rejected each theory in favor of immunity. This decision has been the moving force behind the abolition of charitable immunity in other jurisdictions.[21] The trust fund theory was refuted because of its lack of consistency with the general law of trusts and because of the fiction which imputed to charitable donors the intent to injure beneficiaries without recompense.[22] The waiver theory was attacked as being without foundation in law or in fact.[23] Finally, *Georgetown College* refuted public policy arguments in favor of immunity and introduced independent policy factors supporting its abandonment.[24] The tendency of immunity to encourage neglect, the opposite tendency of liability to induce care, protection of the individual, and the ability of most charities to bear liability through insurance were major arguments made for abolition.[25] In response to *Georgetown College,* some twenty-four states have abandoned the doctrine; while other jurisdictions have limited in part

---

> appears to be in the interest of furthering its beneficent enterprises by precluding uncompensated injury and damage to one which may be occasioned by its actions in carrying out its charitable functions. . . . (2) The delivery and the acceptance of an insurance liability policy between an insurance company and a charitable institution and the payment and acceptance of its premium constitutes, as to the amount of the policy, a waiver by the charity and by the insurance company of the immunity otherwise accorded to the charitable assets. (3) It would appear to be a violation of public policy to permit an insurance company to sell liability insurance for a consideration paid from charitable assets and then to allow or to permit the insurance company to preclude all liability by hiding behind the veil of the insured's charitable immunity.

Cox v. De Jarnette, *supra* at 22-23.

Thus, some jurisdictions appear to have a "waiver" theory which waives immunity when a charitable institution is covered by liability insurance. In a field where many courts speak of public policy as favoring complete immunity, the Georgia court rests its holding on policy considerations which counter the usual arguments. Though the presence of liability insurance would seem to negate the considerations behind the trust fund and public policy theories, in most jurisdictions insurance coverage does not make recovery possible even when it can be shown that recovery will not deplete the assets of the charity. See, *e.g.,* Schulte v. Missionaries of La Salette Corp. of Missouri, 352 S.W.2d 636 (Mo. 1961); Baptist Memorial Hosp. v. McTihge, 303 S.W.2d 446 (Tex. Civ. App. 1957) *error ref. n.r.e.*

[20] 76 U.S. App. D.C. 123, 130 F.2d 810 (1942) (three judges allowing recovery because plaintiff was stranger to charity and three allowing recovery as a consequence of abolishing charitable immunity). Rutledge, J., delivered the opinion of the court, and, though the case was a split decision, the opinion is regarded as a definitive work on charitable immunity and is widely cited.

[21] PROSSER, TORTS, § 127, at 1020-21 (3d ed. 1964).

[22] President and Directors of Georgetown College v. Hughes, 76 U.S. App. D.C. 132, 130 F.2d 810, 824-26 (1942).

[23] *Id.* at 826.

[24] *Id.* at 823-26.

[25] *Ibid.*

its scope and effect.[26] Some courts, however, have felt bound by *stare decisis* or have exercised judicial restraint because of a supposed legislative prerogative in changing existing public policy.[27]

### C. *The Texas Charitable Immunity Doctrine*

Texas courts have developed a body of law on charitable immunity based mainly on public policy considerations.[28] The policy giving rise to charitable protection prevents placing the potential liability of *respondeat superior* upon charities unless they are administratively negligent in the selection or retention of servants and agents.[29] Employees of a charity, however, may recover for injury if the injury results from a breach of duty owed in the master-servant relationship.[30] Negligence of the charity itself will also result in liability if improper equipment for treatment or service is provided.[31] But without a showing of institutional negligence no tort liability for injury can be placed upon a charitable institution. The Texas courts make no exceptions for "strangers" to the charity; depletion of charitable assets takes place whether recovery is had by a stranger or a beneficiary.[32] Neither is an exception made when liability insurance is present,[33] though there is a *dictum* in one case indicating that this might make a difference.[34] In general, Texas courts of civil appeals seem to be bound by *stare decisis* to continue application of the existing charitable immunity doctrine.[35] Also, as late as 1962 the

[26] For cases limiting the operation of charitable immunity see, Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960), Note, 16 Sw. L.J. 689 (1962); Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A.2d 230 (1950). Complete rejection seems to be the current trend. For a general discussion of the problem and for a listing of cases in which immunity has been abandoned see Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV. 71 (1964).

[27] See, *e.g.*, Helter v. Sisters of Mercy of St. Joseph's Hospital, 234 Ark. 76, 351 S.W.2d 129 (1961) (doctrine so firmly established as to be a rule of property); Schulte v. Missionaries of La Salette Corp. of Missouri, 352 S.W.2d 636 (Mo. 1961); Jones v. Baylor Hosp., 284 S.W.2d 929 (Tex. Civ. App. 1955).

[28] See cases cited note 4 *supra*.

[29] See, *e.g.*, Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Baylor University v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929); Koenig v. Baylor Hosp., 10 S.W.2d 396 (Tex. Civ. App. 1928).

[30] Hotel Dieu v. Armendarez, 210 S.W. 518 (Tex. Comm. App. 1919).

[31] Baptist Memorial Hosp. v. Marrable, 244 S.W.2d 567 (Tex. Civ. App. 1951) *error ref. n.r.e.* "It is undoubtedly the duty of a charitable hospital to furnish proper and suitable equipment free from defects for the care and treatment of such patients as it accepts and this duty is a non-delegable duty." *Id.* at 568.

[32] See, *e.g.*, Southern Methodist University v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Baylor University v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929).

[33] Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1957) *error ref. n.r.e.* "We have not found any authority in Texas . . . where the presence of an insurance policy caused any change in the liability or immunity of a charity institution." *Id.* at 448.

[34] J. Weingarten v. Sanchez, 228 S.W.2d 303 (Tex. Civ. App. 1950) *error ref.* "[I]t would certainly not be against public policy to permit pupils to enforce the full extent of any security obtained by a public charity for their benefit. . . ." *Id.* at 311.

[35] See, *e.g.*, Jones v. Baylor Hosp., 284 S.W.2d 929 (Tex. Civ. App. 1955).

Texas Supreme Court seemed disinclined to modify the existing rule in any way.[36] A recent decision by that court in *Watkins v. Southcrest Baptist Church*,[37] however, indicates that future change in or abolition of the doctrine may be likely.

## III. Watkins v. Southcrest Baptist Church

Mrs. Watkins brought suit against the Southcrest Baptist Church of Lubbock, Texas, for injuries incurred when she slipped and fell while on the church premises. The church filed a motion for summary judgment, alleging that it was a charitable, religious corporation and thus was immune from tort liability. The parties stipulated that the church had liability insurance in force, though the amount of coverage and exact provisions of the policy were not shown. In granting the motion for summary judgment, the trial court relied principally upon the decision of the Texas Supreme Court in *Southern Methodist University v. Clayton*.[38] The court of civil appeals affirmed the judgment, stating that the supreme court had earlier been presented an opportunity to make an exception to immunity where insurance was in force but had refused to do so.[39] The supreme court affirmed the judgments of the lower courts.[40]

The opinion of the courts, written by Justice Norvell, reaffirms the doctrine of charitable immunity as defined in *Southern Methodist University v. Clayton*.[41] Though this doctrine was created judicially in Texas, the opinion indicated that its abolition should be effected by legislative action.[42] The court, therefore, refrained from changing present immunity rules, stating that charities in general and the church in particular should be entitled to rely upon former decisions.[43] A concept of institutional waiver of immunity through purchase of liability insurance was dismissed with the statement that "the procuring of indemnity insurance cannot create liability where none exists in the absence of such insurance."[44] The court upheld the *Clayton* doctrine without change. However, a significant portion of

[36] Goelz v. J. K. & Susie L. Wadley Research Institute, 350 S.W.2d 573 (Tex. Civ. App. 1961) *error ref. n.r.e.*

[37] 399 S.W.2d 530 (Tex. 1966).

[38] 142 Tex. 179, 176 S.W.2d 749 (1943).

[39] Watkins v. Southcrest Baptist Church, 385 S.W.2d 723, 724 (Tex. Civ. App. 1964), *aff'd*, 399 S.W.2d 530 (Tex. 1966). The earlier case mentioned by the court of civil appeals was Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1957) *error ref. n.r.e.* See quotation accompanying note 33 *supra*.

[40] Watkins v. Southcrest Baptist Church, 399 S.W.2d 530 (Tex. 1966).

[41] 142 Tex. 179, 176 S.W.2d 749 (1943).

[42] 399 S.W.2d at 533-34.

[43] *Id.* at 534.

[44] *Ibid.*

the court's membership would abolish the immunity doctrine altogether, or at least leave the court free to consider changes in the rule the next time the question is presented.

Justice Walker concurred in the result but would announce that the doctrine of charitable immunity would not be recognized in future cases coming before the court.[45] Justice Greenhill, joined by Justice Steakley, also agreed with the result but stated that the court should feel free to re-examine the doctrine at its next presentation.[46] Citing *Georgetown College,* Justice Greenhill stated that he is "impressed with the arguments made that the doctrine of charitable immunity may now be unsound in the light of current conditions, particularly as to some 'charities' which now enjoy immunity. Some 'charities' are now large business institutions which make substantial charges for their services."[47]

The dissenting opinion by Chief Justice Calvert in which Justice Smith joined is a plea for abolition of charitable immunity. It would overturn the doctrine "without distinction as to the nature or character of the various charitable organizations."[48] If necessary, the dissent would abolish it "effective upon adjournment of the Regular Session of the 60th Legislature in 1967, thus permitting the Legislature to act in the matter if it wished to do so."[49] With one justice calling for prospective overruling, two asking for re-examination at a future date, and two more in favor of abolition in any way possible, judicial support in Texas for charitable immunity appears to be diminishing.

## IV. Conclusion

The court's opinion in *Watkins v. Southcrest Baptist Church* never actually faces the basic question raised by *Georgetown College*[50] and other cases—whether charitable immunity is beneficial or necessary in view of present conditions. That the issues raised in *Georgetown College* had been considered in *Southern Methodist University v. Clayton* seemed sufficient reason to four justices to dismiss them again in *Watkins. Clayton* was decided in 1943, more than twenty years ago; while *Georgetown College* was decided one year earlier in 1942. If the argument that charitable immunity had outlived its usefulness was cogent at the time of the *Georgetown College* decision, further

[45] *Id.* at 535 (Walker, J., concurring in separate opinion).
[46] *Id.* at 535-36 (Greenhill, J., concurring in separate opinion).
[47] *Id.* at 535.
[48] *Id.* at 536 (Calvert, C. J., dissenting).
[49] *Ibid.*
[50] President and Directors of Georgetown College v. Hughes, 76 U.S.App.D.C. 123, 130 F.2d 810 (1942). See text accompanying note 20 *supra.*

change in conditions might force the conclusion that it would be even more cogent today.

Two factors which have changed the nature of charities over the past twenty years were only beginning to emerge at the time of *Georgetown College* and *Clayton*. Prevalence of hospitalization insurance and community support for charities have since that time caused a significant shift in the source of charitable revenue.

If charitable hospital revenue were formerly derived in the main from contributions, today the principal source is insurance payments.[51] In 1941, about twelve million people were covered under some form of health plan.[52] By 1958 this number had increased to one hundred and twenty-three million.[53] In 1955, it was estimated that one-half of the gross charges in American hospitals were paid by insurance benefits.[54] It is probable that this revenue percentage has increased considerably, for today out of every hundred Americans, seventy-one have hospital insurance; sixty-three have surgical insurance; and forty-three have medical insurance coverage.[55] Though hospitalization insurance affects only revenue of hospitals, its importance in a consideration of immunity in general may be verified by noting that hospital cases provide the majority of charitable immunity decisions in the reports.

Another shift in revenue has been caused by community support and recognition of charities. The sustenance provided by the community-wide, united charity drive has decreased in importance the gifts of individual benefactors and has provided the charity with a regular source of revenue. Some businesses strongly encourage their employees to contribute to such fund-raising drives, even to the point of "suggesting" a minimum acceptable percentage-of-salary contribution. Such activity might be encouraged in order to provide better services and facilities, but in accepting funds from a public drive, the charity should recognize a corresponding duty of care to the public. Placing a sense of civic obligation upon the populace to donate to united drives does not mesh well with a denial of liability through charitable immunity. If charities are deserving and appropriate objects of public generosity, the charity should at least compensate its donor-public for harm caused through its own negligent acts.

---

[51] Note, *Charitable Immunity—The Road to Destruction*, 32 TEMP. L.Q. 86, 91-93 (1958).

[52] Saturday Evening Post, *The Post Reports on Health Insurance*, June 7, 1958.

[53] *Ibid.*

[54] Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410, 415 (1956). See also Statistical Abstract of the United States 78, Table 84 (1955).

[55] Saturday Evening Post, *supra* note 52.

The increasing tendency of charities to operate on a "big business" basis is mentioned as another reason for denying immunity.[56] Though the large corporate image cannot be ascribed to every charity, those charities which utilize the services of collection agencies for unpaid bills do not strengthen the picture of institutions seeking to assuage the ills and woes of mankind.

By reaffirming the *Clayton* decision, the court retains its public policy basis. If the Texas immunity doctrine is to continue to be justified on policy considerations, however, these considerations should be expressed in terms of present conditions. Growing centralization of charitable activities, widespread availability of liability insurance, growth of charitable assets, more liberal federal tax deductions for charitable contributions,[57] and increasing public contact with charitable institutions are but a few of the factors deserving consideration by the court. Assuming the same factors which the court used to justify the *Clayton* decision are equally relevant today, a finding to that effect should be made instead of a mere recital of precedent as in *Watkins*.

The apparent deference to the legislature where a change in established policy is involved is in accord with recent decisions dealing with the charitable immunity problem.[58] If the legislature has an inviolable prerogative in regard to a well-established, though judicially-created, doctrine, the decision must be viewed as correct. On the other hand,

---

[56] Watkins v. Southcrest Baptist Church, 399 S.W.2d 530, 535 (1966) (Greenhill, J., concurring in separate opinion).

[57] For years the individual taxpayer could not deduct more than 15% of his adjusted gross income for contributions made to charitable organizations. In 1952 this limit was expanded to 20%. The real expansion, though, came in 1954 when Congress allowed an additional 10% deduction for contributions to a special group of charitable donees, bringing the aggregate limit on charitable deductions for an individual taxpayer to 30%. In 1964 Congress went a step farther in enlarging the list of "30% charities" and in allowing individuals to carry forward contributions to such charities which exceed the limit for a five-year period. INT. REV. CODE OF 1954, § 170. The individual 30% limit does not apply if the taxpayer's charitable contributions and income taxes have exceeded 90% of taxable income for eight of the ten immediately preceding years. In this situation, the taxpayer is entitled to unlimited deductions for charitable contributions. INT. REV. CODE OF 1954, § 170(b)(1)(C).

In addition to the individual deductions provided by § 170, the Code provides that a donor is not subject to federal gift tax on gifts to charities. Another tax advantage is that charitable bequests by a decedent may be deducted in computing federal estate tax liability. INT. REV. CODE OF 1954, §§ 2055, 2522.

In view of the significant tax savings available to individuals in high tax brackets through use of charitable contributions, the importance of tax provisions as a spur to charitable gifts certainly should be recognized. Indeed, in cases of large charitable donations, the tax angle may outweigh pure generosity as a motive for making the gift. Tax provisions remain the same whether or not the charity is liable in tort. Thus, at least one impetus for charitable donations would remain constant if liability in tort were imposed on charities and would perhaps offset potential reluctance of donors to have their gifts used to satisfy judgments.

[58] See, *e.g.*, Landgraver v. Emanuel Lutheran Charity Bd., 203 Or. 489, 280 P.2d 301 (1955) (change should be a matter solely for legislative determination).

the court seems to be tying its own hands unnecessarily. The concern for institutions relying upon the established policy could be satisfied by a form of prospective overruling or by giving notice of future reconsideration.[59] When giving the legislature an opportunity to decide an issue is of paramount importance, the third alternative suggested by Chief Justice Calvert's dissenting opinion could be used. By making abolition effective upon adjournment of the next regular session of the legislature, the court's decision would be contingent upon tacit approval being given by the silence of that body.[60] Notice of future re-evaluation, as suggested by Justice Greenhill, also would give the legislature an opportunity to speak.[61] This form of notice must be contrasted with the "Sunburst"[62] approach to prospective

[59] 399 S.W.2d at 535-36 (Greenhill, J., concurring in separate opinion); *Id.* at 536 (Calvert, C. J., dissenting).

[60] *Ibid.*

[61] *Id.* at 535-36 (Greenhill, J., concurring in separate opinion).

[62] The term comes from the style of a Supreme Court case in which the method of prospective overruling was upheld as constitutional. Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), *affirming* 91 Mont. 216, 7 P.2d 927 (1932). Mr. Justice Cardozo delivered the opinion of the Court only a short time after he had delivered an address to the New York State Bar Association concerning the prospective overruling question. While still chief judge of the New York Court of Appeals, Cardozo repeated his belief that actual reliance on prior decisions was not as widespread as it was often assumed to be. In cases where strong reliance was present, however, he suggested an application of the former rule to the case at bar with an announcement that the court would feel free to apply another principle in future cases. Emphasizing more the announcement of future change than the explicit definition of a new rule, Cardozo realized this would leave the law in a state of uncertainty. Though an announcement of a new principle was only a *dictum*, he felt parties could rely on the probability that a court would follow such a *dictum* at the next presentation of a question. Address by Chief Judge Cardozo, New York State Bar Association, January 22, 1932, in *55 Report of N.Y.S.B.A.* 263, 294-96 (1932). See generally Levy, *Realistic Jurisprudence and Prospective Overruling* 109, U. PA. L. REV. 1 (1960).

The Sunburst case involved a state court statutory interpretation which was not made retroactive. Upholding the procedure used by the Montana court against constitutional attack, Cardozo said:

> The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule.

Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., *supra* at 365-66.

The "Sunburst" doctrine has been praised for its contribution to judicial flexibility.

> Prospective overruling is only one of many positive ways of placing newly formulated judicial law on a sound basis. . . . The future beckons us to experiment, once the dead past has buried its long since dead. For when we see the judge as himself, a partial legislator in a period of legislative dominance, we shall be freed to devote a disciplined and unencumbered imagination to the task of aiding judicial lawmakers to perform their duties with facilities more appropriate to their function.

Levy, *supra* at 30.

Yet acceptance of the doctrine has not been complete. *Compare* Note, 42 YALE L.J. 779, 782 (1933); 28 ILL. L. REV. 277, 280 (1933) and 60 HARV. L. REV. 437, 439-40 (1947), *with* Note, 47 HARV. L. REV. 1403, 1412 (1934).

Justice Walker's position in *Watkins* corresponds to the holding in the *Sunburst* decision,

overruling advocated by Justice Walker's concurring opinion. Such a position would adhere to precedent in the particular case before the court but would announce a different rule to be applied in later cases. Use of the "Sunburst" doctrine can give rise to objections,[63] but in spite of these criticisms, even the "Sunburst" approach could counter the reasons given by the Texas Supreme Court for its hesitation.[64]

The court correctly recognized that the legislative process is more flexible than judicial decision and that it often is more deliberate.[65] However, these advantages are often outweighed by legislative vulnerability to special interest pressure and by inaction in the face of emotional issues.[66] This especially might be true in a consideration of charitable immunity. Where religious groups in particular wield effective and highly organized legislative pressure, a rational and unemotional discussion of the merits might not be possible.

The decision in *Watkins* solves for the moment the issue of retention of charitable immunity in Texas. The reasons given by the court for retention, however, are not particularly convincing or satisfying. With a majority of the court now committed to abolition or re-examination, *Watkins* may point the way to eventual discard of the charitable immunity rule in Texas.

*Teddy M. Jones, Jr.*

---

but Justice Greenhill's suggestion that notice of future re-evaluation be given was also endorsed by Cardozo. See Address by Chief Judge Cardozo, New York State Bar Association, January 22, 1932, in 55 *Report of N.Y.S.B.A.* 263, 294-96 (1932).

[63] The three principal objections to use of the Sunburst approach are: (1) while a court may refrain from making a statutory interpretation retrospective, it should not do so as regards a common-law rule; (2) announcement of the new rule would be mere *dictum* and would not be binding on the court; (3) the procedure discourages litigants from appealing since changes by the court would not benefit them. Levy, note 62 *supra*.

[64] See note 62 *supra* and accompanying text.

[65] 399 S.W.2d at 533.

[66] Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash.2d 162, 260 P.2d 765, 775 (1953) (concurring opinion by Grady, C. J.):

> [E]xperience has demonstrated that when immunity from liability is involved, legislatures are faced with strong opposition to change by those who are the beneficiaries of such rule, and proponents of a change find efforts to secure corrective legislation futile. When such a situation arises and the courts have become convinced that the rule should no longer exist, there is justification for action to be taken by them.