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Obiter Dicta

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"An *obiter dictum,* in the language of the law, is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it."*

TORTS OF CHARITABLE INSTITUTIONS

The conflicting doctrines governing the tort liability of charitable institutions have appeared on the juristic scene once again disclosing the usual disorder and confusion. This time the conflict of precedents is reviewed by Associate Justice Rutledge in his scholarly opinion in *Georgetown College v. Hughes,* 130 F. (2d) 810 (App. D. C., 1942). It would be reckless to predict that the opinion will terminate all controversy on the point, but the observation is permissible that no more thorough and exhaustive judicial discussion of this unsettled phase of the law will be likely, at least "for the duration". In that sense the opinion is all that could be desired. Moreover it offers what appears to be a persuasive and complete argument for the universal abolition of the tort immunity with which many jurisdictions still clothe such institutions.

An Able Opinion

The instant case involves a situation in which a special nurse, in the employ of a patient and not the hospital, was injured while walking through a corridor by being thrown to the floor when a student nurse hastily and without warning pushed open a swinging door. The appellant, Georgetown College, maintaining the hospital, contends that the general rule of *respondeat superior* is inapplicable because of the appellant's status as a charitable institution.

While all six justices of the court agreed on the outcome, three justices concluded that the fact that the appellee was a stranger to the charity, was a sufficient ground for affirming the judgment against the hospital. The other three justices contended that the facts permitted an interpretation of the appellee's status as either a beneficiary or a stranger and, while not undertaking to define her exact status, placed their affirmance on the broader basis that there should be no immunity from tort liability solely on account of the institutional character of the appellant.

Justice Rutledge traces the beginnings of the immunity, which American courts have accorded to charitable institutions, to a dictum in an English case decided in 1846. *Feoffees of Heriot's Hospital v. Ross,* 12 Clarke & Fin 507, 513 (1846). There Lord Cottenham said that to give damages in such a cause would be to defeat the intent of the donor of the charity, whose object was not to fritter away the donation in lawsuits but to put its benefits at the disposal of the needy. While this dictum was rejected by the English courts in 1866, it was nevertheless followed by Massachusetts in 1876 and Maryland in 1885, and became the basis of the American "trust fund" theory of immunity from tort liability. *McDonald v. Mass. General Hospital,* 120 Mass. 432 (1876); *Perry v. House of Refuge,* 63 Md. 20 (1885).

A Dictum Gone Astray

Beginning with these cases, American jurisdictions have run the gamut of intellec-

tual acrobatics on the subject: from cases where only strangers to the charity could recover [*Cashman v. Meriden Hospital,* 117 Conn. 585, 169 Atl. 915 (1933)] to cases where even patients could recover when the managing officials were negligent [*Old Folks' and Orphan Children's Home v. Roberts,* 91 Ind. App. 533, 171 N.E. 10 (1930)]; from cases offering virtually unqualified immunity to the institutions [*Gable v. Sisters of St. Francis,* 227 Pa. 254; 75 Atl. 1087 (1910)], to cases imposing unqualified liability [*Welch v. Frisbie Memorial Hospital,* 90 N. H. 337, 9 A. (2d) 761 (1939)]; from cases where liability could be imposed to the extent of property owned by the institutions but not used directly in the furtherance of the charity [*Morton v. Savannah Hospital,* 148 Ga. 438, 96 S.E. 887 (1918)], to cases, oddly enough, where liability would be enforced only if the institution were covered by insurance. *O'Connor v. Boulder Colorado Sanitarium Ass'n.,* 105 Colo. 259, 96 P. (2d) 835 (1939).

The Dictum In Action

The *Georgetown College* case focuses a revealing light upon the anomalies inherent in the above contradictory theories. Attention is first called to the prevailing tort doctrine that charitable intent is no excuse for wrongful harm. In the words of Justice Rutledge: "Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing." P. 813. An individual, whether doctor or layman, undertaking to perform charitable acts is responsible for the lack of due care in such performance. But convert the charitable individual into a charitable institution and liability is cut down. The learned Justice groups the immunity theories into two classes: the "trust fund" theory and its affiliates, and the so-called "waiver" theory. The first theory is that, if charitable institutions were to be held liable for the torts of their employees, the purposes and ends of the donor of such charity would be frustrated. Again it is argued that imposition of liability upon such institutions would discourage the future contributions to charity. The first objection posed by Justice Rutledge relates to the inconsistencies among jurisdictions adhering to such doctrines. If the "trust fund" theory is accepted, should not liability be totally excluded and not made to depend upon whether the tortfeasor was a manager or a janitor, whether the injured party was a beneficiary or a stranger to the charity, or whether the institution had insured itself against such losses? Further, the opinion casts doubt upon the assertion that charitable donations as a practical matter are seriously dissipated by such suits or that donors actually would be deterred from the creation of charities merely by the possibility of the depletion of the "trust fund" by tort claims. But if serious shrinkage becomes a reality, the opinion holds out insurance as the obvious answer to such fears. Finally, in suggesting a choice between the conflicting policies, there is mentioned the tendency of immunity to foster neglect and of liability to induce caution. Certainly the donor's real purpose is to help, not to harm, his future wards.

A Judicial Appraisal

The "waiver" theory proceeds on the assumption that persons accepting the aid offered by charitable institutions impliedly waive the right to sue, if wronged, in consideration of the charity tendered. Such an assumption is, of ocurse, purely fictional. Legal fictions are created in order to give some plausibility to what courts consider a just result and they should not be resorted to where their use results in a clear injustice. But the injustice of the stated fiction is easily shown: the charit-

able patient is not in a position to haggle about terms and liabilities. "He expects care . . . not carelessness." He also is a person who must resort to charity and is least able to bear the burden of any harms which may be negligently inflicted upon him.

The New York Rule

The course of New York law aptly illustrates the difficulties of establishing a single rule of liability and applying it without deviation. After first rejecting the "trust fund" theory and then the "waiver" theory which had been embraced in its place, New York has finally settled upon the rule that charitable institutions are liable to strangers and beneficiaries alike for the torts of their administrative officials and employees [*Dillon v. Rockaway Beach Hospital & Dispensary,* 284 N. Y. 176, 30 N. E. (2d) 373 (1940)], although not for those of their professional staff who, in this state, come under the classification of independent contractors. *Hamburger v. Cornell University,* 240 N. Y. 328, 148 N. E. 539 (1925).

The inertia of courts to effect any change in the rule of immunity where it presently exists suggests the necessity for legislative action. Justice Rutledge's study of the question constitutes a document which should be of invaluable aid to any state legislature contemplating a change in this particular sphere of the law.

The Erie Case Again

An Epochal Case

When the Supreme Court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1938) reversed the course which it had pursued for almost a century, the court at one stroke, not only wiped out a vast store of federal "common law" but it created problems concerned with the application and delineation of the doctrine announced. It will require more years than have passed before the exact scope of the doctrine is defined. Simplicity of thought and a certain orderliness in treatment would suggest that under the new doctrine, federal law applies to matters of procedure and state law to questions of substance. But even were we to admit this neat division, the task of distinguishing between matters of substance and those of procedure remains. If Professor Walter Wheeler Cook is correct, there is a "twilight zone" between the two. [Cook, *"Substance" and "Procedure" In The Conflict of Laws* (1941) 42 Yale L. J. 333; *cf.* Kocoureck, *Substance and Procedure* (1941) 10 Fordham L. Rev. 157].

A New Angle

An effort to give mechanical application to the concepts of substance and procedure was rejected squarely by a federal district court in Missouri in *Hardie v. Bryson,* 44 Fed. Supp. 67 (1942). An Illinois resident came into Missouri to defend a suit in the *federal* court. He was served with process in another suit which had been instituted against him in the *state* court. This latter suit was removed to the federal court on grounds of diversity of citizenship; and a motion was made by the defendant to dismiss on the ground that he was immune from service of process under principles well established in the great majority of jurisdictions with the exception of Missouri and a few others. Against the contention of the plaintiff's attorney that the question of immunity from service is a matter of "general jurisprudence" and hence a matter of substance which, under the *Erie* case, the federal

court should decide in accordance with Missouri precedents, the court dismissed the suit. It made the observation that the rule immunizing witnesses, suitors and their attorneys from service of process in a suit while attending another trial, "really stands in a class by itself, having nothing to do with a party's rights (substantive law) or the manner in which the party gets those rights (procedural law, in the common sense)."

The decision gives point to an obvious limitation upon the doctrine of the *Erie* case: that the decision was clearly never designed to circumscribe the methods which have been devised for the conduct of litigation and administration of justice in the federal courts, even though the case may be one of diversity of citizenship. In a diversity-of-citizenship case, it is true that the court must apply state law in determining the substantive rights of the litigants. However, the court too has rights. For instance, it has the right to be free from contumacious action or other conduct which hampers its functions. It could hardly be urged that the court's power to punish for contempt depends for its exercise upon state law [*Ex parte Grossman,* 267 U. S. 87 (1935)]; it would be inaccurate to say that the federal court exercises such power in a diversity-of-citizenship case simply because the law relating to contempts is "procedural". So also it would be error to label immunity from service of process basically procedural. It is a rule of ancient origin and was designed to protect the courts themselves which would often be embarrassed and sometimes interrupted, if the court's suitor or its witnesses were vexed by service of process. Considering the reason for the original grant of jurisdiction to the federal courts over controversies involving citizens of different states, there would appear to exist greater cause in these cases for the court refusing to take jurisdiction of a suit commenced by service of process on a suitor while appearing in a federal court. In fact, the court in this case suggests that even a state court should, on grounds of comity, apply the federal rule where a suit in the state court is commenced by service of process on a suitor attending a federal court. Those in attendance are *in custodia legis* so to speak. The crucial fact in this case was that the defendant was served while *attending a federal court.*

Rights of the Court

In writing the opinion in *Long v. Ansell,* 293 U. S. 76 (1934), Justice Brandeis, who wrote for the Supreme Court in the *Erie* case, characterized the rule of immunity from service in this language: "That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individual concerned." It may not be going too far afield to mention that similar argument was advanced by Justice Roberts in his separate concurring opinion in *Sorrells v. United States,* 287 U. S. 435, 453 (1932) as an explanation for what the majority of the court called the "defense" of entrapment. Justice Roberts, with whom Justices Brandeis and Stone concurred, was of the opinion that where a government officer has induced a person to commit a crime, that person is no less guilty by reason of that fact, but that the court should refuse to entertain a prosecution for the crime. "The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." (*Id.* at P. 457)

What is Immunity?

Perhaps danger exists that such jealous regard for their own prerogatives may be

carried to an extreme by the courts, for, after all, we pride ourselves in being a nation governed by laws and not by men. The eloquent warning of Chief Justice Stone, directed to the judicial order, comes to mind: ". . . the only check upon our own exercises of [judicial] power is our own sense of self-restraint." [Dis. op. of Stone, J., in U. S. v. Butler, 297 U. S. 1, 79 (1936)]. But at least in all the instances just considered the fundamental principle of judicial authority seems to have been correctly applied.

A Mild Caveat

WHO IS AN "INVITEE"?

Sometimes there may be found, relegated to an obscure part of the reports, a decision which, though lacking a full exposition of the pertinent law involved, contains enough information on the case to attract interest. For instance, the Appellate Division of the Second Department recently decided that a person who entered upon railroad property for the purpose of seeking employment, not with the railroad, but with consignees as a loader of goods shipped into the railroad's freight yard, had the status of an invitee of the railroad, and as such could recover from the railroad for injuries sustained as a result of the latter's failure to operate properly its locomotive. One justice dissented on the ground that the plaintiff was a mere trespasser. Although the short memorandum opinion delivered in *Antonio v. Long Island Railroad Co.* [N. Y. L. J., Nov. 24, 1942, p. 1601, col. 3] does not set forth facts sufficient to permit an appraisal of the decision *in toto*, it does suggest some discussion of the duties owed by an occupant of premises to those seeking employment thereon. A mere statement of the decision indicates its practical importance.

Trespasser or Invitee?

No more fundamental principle obtains in the Law of Negligence than the one that liability depends upon the violation of a definite duty of care owed to the injured person. "'Proof of negligence in the air, so to speak, will not do.'" *Palsgraf v. Long Island R.R. Co.*, 248 N. Y. 339, 341, 162 N. E. 99 (1928). It is also axiomatic that the particular situation of the alleged wrongdoer and the injured person will modify the duty. A landowner is virtually sovereign over his land and it would indeed be anomalous if he owed the same duty to all those who happened to be present on his land, without regard to whether they were there with or without his permission. The traditional method, therefore, of stating the degree of care owed by the landowner to those who come upon his land is by reference to the status of the visitor. BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 156. The trespasser, who has no right whatever to be there, is not entitled to be protected from the mere carelessness of the owner, but his unauthorized intrusion does not justify wilful or wanton injury. *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474 (1906). There are also those who may be permitted to be on the land solely because of the generosity of the owner, such as social visitors. Such persons are usually called "licensees" and, as would be supposed in the case of the recipient of a gift, they are expected to take the premises in the condition in which they find them, excluding hidden traps or pitfalls. *Brinilson v. Chicago & N. W. R. Co.*, 144 Wis. 614, 129 N. W. 664 (1911). But while the licensee risks the condition of the premises, he does not assume the risk of dangers superadded by the active negligence of his host.

Landowner's Duty