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Reassessing Charitable Immunity in Virginia

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ESSAY

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One central principle of substantive tort law is that each individual assumes responsibility for the harm which the person negligently causes. Moreover, compensation was one significant, and perhaps the major, purpose of tort law throughout much of the twentieth century. Across many doctrinal areas, most state supreme courts in the United States fashioned new law or reworked existing precedent to facilitate the vindication of these tort law concepts, while numerous state legislatures passed statutes which promote the tort goals' vindication. Illustrative is the judicial or legislative abolition of immunities, which relieve defendants from tort liability because of certain relationships between the defendants and plaintiffs. Therefore, at the outset of the twenty-first century, the immunities which govern charities, families and governmental entities have long been, and increasingly are, on the wane.

Notwithstanding these national developments that implicate charitable immunity, the Supreme Court of Virginia and the Virginia General Assembly have essentially retained intact the charitable immunity doctrine.[1] Moreover, the Supreme Court of Virginia has declared on numerous occasions that it is the prerogative of the General Assembly, not the court, to abolish chari-

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1. One notable exception is immunity for certain hospitals. *See* VA. CODE ANN. § 8.01-38 (Repl. Vol. 2000 & Cum. Supp. 2006). *See generally* Barbara Ann Williams, *Charitable Immunity: What Price Hath Charity?*, 28 U. RICH. L. REV. 953, 953–54 (1994).

table immunity.[2] Because Virginia doctrinal developments which involve charitable immunity do not comport with trends across the country and have significant implications for plaintiffs, and for defendants which assert charitable immunity, these doctrinal developments warrant analysis. This essay undertakes that effort.

Most American jurisdictions recognized some form of charitable immunity which enabled charities to pursue their missions without exercising reasonable care and excepted them from responsibility for any injuries that are attributable to their negligence.[3] Judges supplied various justifications for the notion of charitable immunity. Courts maintained that imposing liability on a charitable organization could divert trust funds for purposes other than the charity's benevolent goals and the donor's intent, and that normal rules governing vicarious liability should not apply to the injurious behavior of a charity's employees. Judges also asserted that a charitable beneficiary should not recover from the charity because the recipient waives any claim or assumes the risk. Moreover, courts suggested that imposing liability upon a charity might discourage donors from pledging resources to the organization, thus limiting a charity's ability to perform good works.

Many judges and numerous additional critics, however, have repeatedly demonstrated that these rationales lack persuasiveness. For example, the jurists and commentators refute the trust fund idea by arguing that most charities are corporations and that parties to a contract typically cannot dictate their tort liability vis-à-vis those who are not parties to the instrument. The waiver or assumption of risk concept was at best fictional and at worse eliminated protection for those who most needed it. The notion of bankrupting charities was refuted by the idea that the institutions must only engage in reasonable behavior, as is expected of any entity. Even were reasonable care too much to request of charities, the expense of insurance is not. Finally, all of these policies derive from the idea that charities warrant subsidization; however, victims of negligence whose recovery is denied are forced to make a "coerced donation." In the end, courts refuted all

2. *See* Mem'l Hosp., Inc. v. Oakes, 200 Va. 878, 887–89, 108 S.E.2d 338, 395–96 (1959). *See generally* Williams, *supra* note 1, at 953–54.

3. I rely substantially in the next two paragraphs and throughout this piece on DAN DOBBS, THE LAW OF TORTS § 282 (2000).

of the reasons earlier articulated for recognizing the immunity, while a majority of courts and legislatures in American jurisdictions have now abrogated charitable immunity.

The Commonwealth of Virginia is *not* among those states, aside from the limited statutory exception for certain hospitals mentioned above.[4] As recently as 2005, the Supreme Court of Virginia strongly reaffirmed the applicability of the longstanding charitable immunity concept, while the justices thoroughly and clearly enunciated the reasons for the doctrine's recognition and retention and how immunity operates as a practical matter in concrete cases. *Ola v. YMCA of South Hampton Roads*[5] is the recent and leading opinion on charitable immunity in Virginia.

The justices declared that the doctrine is firmly embedded in state jurisprudence and has become part of its general public policy.[6] The immunity is premised on the policy that the resources which a charity possesses are better used to advance the institution's public policies than to pay tort judgments in litigation in litigation which their beneficiaries file. When philanthropists' gifts support a charity, that burden is removed from the public, so the diversion of charitable gifts to pay tort judgments concomitantly nullifies the gifts and reimposes the burden on the public. The *Ola* decision instructs that Virginia has a limited form of immunity which exempts charities from some tort liability. A charitable organization enjoys immunity for the actions of its servants and agents only when the charity exercises due care in the selection and retention of its servants and agents. The immunity also does not cover invitees or strangers without a beneficial relationship to the charitable institution. Moreover, the immunity does not preclude liability for elevated forms of negligence that are characterized as gross, willful or wanton.

A charity must prove two elements to establish immunity. First, the entity must demonstrate that it is organized with a recognized charitable purpose and that the institution actually operates in accord with this purpose. More specifically, Virginia courts analyze whether an organization's articles of incorporation

4. *See supra* note 1 and accompanying text.

5. 270 Va. 550, 621 S.E.2d 70 (2005). I recognize that the Supreme Court of Virginia has articulated a rather comprehensive jurisprudence of charitable immunity; however, *Ola* is the most recent enunciation and one of the more comprehensive pronouncements.

6. I rely in this paragraph and the next three paragraphs on *Ola*, 270 Va. at 555–57, 621 S.E.2d at 72–73. *See generally supra* note 2 and accompanying text.

have a charitable purpose and whether the entity in fact operates consistently with that purpose. Second, a charity must establish that a tort claimant was a beneficiary when the alleged injury occurred.

The court, thus, first assesses the organization's powers and purposes which are prescribed in its charter. If the charter sets forth a charitable purpose, a presumption arises that the institution operates according to that purpose, which may be rebutted by showing that it does not so act. Supreme Court of Virginia precedent establishes numerous factors that indicate whether an entity actually operates with a charitable purpose. Illustrative are whether the institution's charter limits the organization to a charitable purpose and whether the charter includes a not-for-profit limitation, whether the entity depends on contributions and donations for a substantial portion of its existence, and whether the charity is exempt from various federal and state taxes. The factors are not exclusive, so the presence or lack of any specific consideration is not dispositive. In the end, whether an organization functions as a charity depends on the particular case's facts and not the specific type of institution.

The Supreme Court of Virginia or the Virginia General Assembly should abolish the immunity.[7] Most important, the immunity's continuing operation contravenes the general tort law principle that individuals must be responsible for the harm which their negligence causes and frustrates the compensatory purpose of tort law. There are correspondingly no compelling public policy reasons for retaining the immunity. Charities, many of which are corporate entities, should not be able to dictate by contract their liabilities to individuals who are not parties to it. Charitable institutions should concomitantly be required to exercise reasonable care in all their activities, while any entity that enjoys charitable status and operates in society should at least be required to secure insurance against harm that the institution negligently causes. Victims of negligence at the hands of charities should not be required to make a "coerced donation," while the immunity's retention fails to encourage the exercise of reasonable care by

7. The General Assembly may be the preferable entity to abolish immunity because the supreme court has declared that immunity is firmly embedded in state law, so the legislature must abrogate it. However, it is arguable that the supreme court is an equally appropriate entity to modify a common law doctrine like immunity because the court first recognized the immunity. *See supra* notes 2, 5 and accompanying text.

charities and prevents the realization of tort law's deterrent purpose.

In sum, charitable immunity is on the wane in the United States principally because this doctrine violates the general tort law principle of individual responsibility for negligently inflicted harm and contravenes the compensatory goal of tort law. The Supreme Court of Virginia or the Virginia General Assembly should seriously consider eliminating charitable immunity because none of the justifications that historically supported the immunity retains salience in modern society.