WHEN SHOULD CHARITY BEGIN AT HOME

THE OUTMODED CONCEPT OF CHARITABLE AND NONPROFIT ORGANIZATIONAL IMMUNITY

Charitable immunity is an outmoded legal concept. Its existence shields from accountability such organizations and those persons in their employ who cause tortuous harm to others.

The controlling statute in Massachusetts is M.G.L. Chapter 231, section 85K, which caps damages at twenty thousand dollars. It states:

> It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes.

Immunity in Massachusetts extends far beyond the parameters of charitable institutions. A charity is merely a subset of the larger class of nonprofit organizations that have limited tort immunity under M.G.L., Chapter 231 section 85K. A nonprofit organization is one organized for purposes other than generating profit. No part of the organization's income is distributed to its members, directors, or officers. Nonprofit corporations are often termed "non-stock corporations." They can take the form of a corporation, an individual enterprise, an unincorporated association, partnership, foundation or even a condominium. Examples of nonprofit organizations are churches, public schools, public charities, public clinics and hospitals, political organizations, legal aide societies, volunteer services

organizations, labor unions, professional associations, research institutes, museums and some governmental agencies.

Massachusetts' law gives immunity to a narrow group of individuals who operate nonprofit organizations. M.G.L., Chapter 231: section 85W states:

> "…no person who serves without compensation, other than reimbursement for actual expenses, as an officer, director or trustee of any nonprofit charitable organization including those corporations qualified under 26USC section 501 (c)(3) shall be liable for any civil damages as a result of any acts or omissions relating solely to the performance of his duties as an officer, director or trustee; provided, however, that the immunity conferred by this section shall not apply to any acts or omissions intentionally designed to harm or to any grossly negligent acts or omissions which result in harm to the person. Nothing in this section shall be construed as affecting or modifying any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the immunity conferred by this section.
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> Nothing in this section shall be construed as affecting or modifying the liability of any person subject to this section for acts or omissions which are committed in the course of activities primarily commercial in nature even though carried on to obtain revenue to be used for charitable purposes, nor for any cause of action arising out of such person's operation of an automobile.

MASSACHUSETTS CASE LAW

In 1989, the $20,000 cap on damages was tested under equal protection and due process grounds in English v. New England Medical Center, Inc., 541 N.E. 2d 329, 405 Mass. 423, certiorari denied 110 S.Ct. 866, 493 U.S. 1056. Upholding the cap, the Massachusetts SJC observed that the "objective of protecting funds of charitable institutions so they can be devoted to charitable purposes is legitimate and the means chosen bear rational relationship thereto, even if the amount of the cap is low."

Since the English decision the rate of inflation has averaged approximately three percent per year. The cost of healthcare services has

consistently outpaced the cost of living index. The size and wealth of "charitable hospitals," such as the Massachusetts General Hospital's PARTNERS, were never contemplated by the framers of the statute. Also, the advent of HMOs has significantly altered the public policy rationale for the statute when it was enacted almost thirty years ago.

Despite these factors, Massachusetts Courts have broadly interpreted the cap. For example, the cap has been extended to parochial schools even though the activity in which the injury occurred was commercial in nature:

> "[I] n [the] context of [a] statutory liability cap, the activity is primarily commercial only when it is entirely disconnected from charity's purposes." Missett v. Cardinal Cushing High School 43 Mass.App.Ct. review denied 425 Mass. 1108 (1997).

The cap has also been applied to activities at universities "…even if some revenue-producing activities took place…" St. Clair v. Trustees of Boston University 25 Mass.App.Ct. 662, review denied 402 Mass. 1104 (1988), also see, Mullins v. Pine Manor College 389 Mass. 47 (1983). Indeed, the SJC has been very protective by finding a "charitable purpose" to be paramount when evaluating the facts of individual cases: "In determining whether the particular activity falls within charitable purposes of educational institutions for tort liability purposes, the term "education' is to be broadly and comprehensively construed." Missett v. Cardinal Cushing High School, ibid; See also, "statutory exception rendering charitable corporations liable for tort damages over statutory limit, when corporations activities are primarily commercial in character, requires commercial activity that is entirely disconnected from defendant's charitable purpose." Linkage Corp. v. Trustees of Boston University 425 Mass. 1, certiorari denied 118 S.Ct. 599 (1997).

Infrequently, the Court has found a "charitable" entity liable for its tortious activity beyond the statutory cap. In one case a court held:

> Where funds derived from regular Saturday night dances sponsored by defendant organization constituted 85 to 90% of its income and were used primarily to pay mortgage and overhead expenses on its building, jury could find that defendant was not engaged in activity directly within any alleged public charitable purpose when accident occurred but was engaged in primarily commercial activity and thus was not entitled to defense of charitable immunity, in action for injuries due to negligence. Phipps v. Aptucxet post No. 5988 V. F. W. Bldg. Ass'n., Inc. 7 Mass.App.Ct. 928 (19790.

In Phipps, the facts were dramatic but the Court's finding has rarely been followed in other cases. However, an interesting in-road has been made when a charitable institution operates a for-profit subsidiary that causes an injury. In one case, a patron was at a concert in a theater operated by a charitable arts foundation. She brought suit against the foundation when the table at which she was sitting overturned. The court held that she was entitled to amend her complaint and to add the foundation's wholly owned subsidiary as a defendant. The commercial subsidiary had catered the event. The foundation had evaded the discovery of the subsidiary's existence. The court stated that it was conceivable that the patron would have a claim against the subsidiary. The subsidiary was not entitled to the charitable immunity that protected the foundation. Proctor v. North Shore Community Arts Foundation 47 Mass.App.Ct. 372 (1999).

In tort suits against hospitals and "other institutions" the Massachusetts Supreme Judicial Court, and the 1st Circuit have held that the doctrine of charitable immunity is no longer a defense against general liability. However, they have continually reaffirmed the statutory cap and have never increased it. Higgins v. Emerson Hospital 367 Mass. 714 91975); Johnson v. Wesson Women's Hospital 367 Mass. 717 91975); Trala v. Shea 335 F. Supp. 81 (DC Mass, 1971); Perloff v. Symmes Hospital 487 F. Supp. 426 (DC Mass, 1980). Also see, the charitable exemption applies only when the activity in question is both charitable and not primarily commercial. See Mason v. Southern New England Conference Ass'n. Of Seventh-Day Adventists 696 F. 2d 135,140 n.8 (1st Cir. 1982).

Recently, a Massachusetts Superior Court judge once again found a rationale for "charitable immunity" under questionable factual circumstances. A plaintiff was injured at a cultural center's "reggae event." The court held that the defendant's liability was limited to $20,000 because the event served the defendant's charitable rather than commercial purposes. The court found that the defendant, Caribbean Cultural Center Inc., was a charitable organization pursuant to its Articles of Organization. The court also found that the corporation had a charitable purpose in fostering an awareness of the Caribbean culture by playing reggae music, even though it generated a substantial amount of profit from the dance events. Jimenez, et al v. Caribbean Cultural Center, Inc., et al, Middlesex Superior Court MICV 95-03269, Massachusetts Lawyers Weekly, p.21, March 27, 2000.

Since charitable immunity is an affirmative defense, the charity bears the burden of going forward with evidence that is sufficient to warrant the conclusion that it is a public charity. McDonald v. Massachusetts Gen. Hosp., 120 Mass.432 (1876). The plaintiff can rebut this evidence or,

alternately, seek to shoulder the burden of going forward with evidence that the defendant was acting outside its charitable corporate powers when the tort happened. McKay v. Morgan Memorial Co-op Indus. and Stores, Inc., 272 Mass 121,123 (1930).

Even if the plaintiff presents credible evidence that an organization, such as Massachusetts General Hospital, is acting outside its charitable corporate powers or that its activity was primarily commercial, the charitable defense is not eliminated. Its charter "is prima facie evidence of charitable purpose and operation…" Barrett v. Brooks Hosp., Inc., 338 Mass. 754, 758 (1959), overruled on other grounds by Colby v. Carney Hosp., 356 Mass. 527 (1969).

Under Massachusetts law there is a difference between a presumption and prima facie evidence. See, Boxer v. Boston Symphony Orchestra, Inc. 342 Mass. 537,538 (1961). A presumption is rebuttable. Once rebutted it disappears. In contrast, prima facie evidence does not disappear; it remains and is accorded whatever weight the jury sees fit to give it. Paul J. Liacos et al., Handbook of Massachusetts Evidence, section 5.5.3, at 230 (7th ed. 1999). It is up to the fact finder to determine whether the defense is appropriate or inappropriate.

TRADITIONAL PUBLIC POLICY ARGUMENTS

Charitable immunity was established because it was thought improper to divert funds for tort judgments that had been given for charitable purposes. See, Roosen v. Peter Bent Brigham Hosp. 235 Mass.66, 68 (1920). This public policy decision came to be called the "trust fund" rationale. Charitable immunity did not apply to torts committed in the course of revenue generating activities even if the money was to be applied to charitable purposes. See Mckay, 272 Mass. at 124. Yet, the courts were reluctant to find liability even when the activity was commercially related. The Massachusetts' courts eventually made the further distinction that the immunity would stand if the revenue was produced only "incidentally" to some charitable activity. See Boxer, 342 Mass. at 539. The protection afforded by charitable immunity, however, may be lost if the commercial nature of the activity gives rise to the injury. "Directly charitable activities are meant to be contrasted with those activities whose thrust is commercial, rather than with all other forms of activities that may in some sense be only indirectly charitable." See, Mason, 696 F. 2d at 139.

Evidence that the institution acted ultra vires may also deprive a charity of its immunity. The focus is not upon the status of the organization

as a charitable institution but upon the facts that it acted outside its charitable purpose. See, Barrett, 338 Mass. at 757. It is still evident, however, that Massachusetts' courts will allow charitable organizations considerable leeway in the conduct of their activities. In Carpenter v. Young Men's Christian Ass'n, 324 Mass. 365, 371 the court stated that if there is an "adherence in the main to the declared purpose of the charity, the incidental variations do not destroy the right to the exemption."

OTHER STATES

The defense of charitable immunity has been abolished, in suits against hospitals, in the following states:

> Arizona, California, Delaware, District of Columbia, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, Wisconsin.

As early as 1951, the Arizona Supreme Court held in the case of Ray v. Tucson, 230 P2d 220 that the public policy of the entire nation rests firmly against releasing any employer from liability for damages caused by its employees. It held that a jury trial was appropriate against a defendant hospital where its employee, a nurse's aide, lost control of a stretcher on which a patient was reclining. The patient was thrown to the ground and was injured.

In tort suits against organizations other than hospitals, the following states have completely abolished the defense of charitable immunity:

> Arizona, California, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington, Wisconsin.

If tiny Rhode Island and its attendant charitable and nonprofit organizations have found a way to provide a viable economic climate for these institutions while, at the same time, providing compensation for people injured as a result of their negligence can Massachusetts legislators do less?

THE PUBLIC POLICY FOR ABROGATING THE DAMAGE CAP

Massachusetts' courts are currently finding public policy reasons for reexamining the cap on damages. A Norfolk Superior Court judge recently awarded an estimated 6.5 million dollars to the family of a boy who suffered brain damage shortly after he was born at Brigham and Women's Hospital. The hospital claimed it could not locate the medical records dealing with the boy's care. The court ruled that as a sanction for its conduct the hospital should be stripped of its charitable immunity and the cap on its damages. Keene, et al v. Brigham and Women's Hospital (Norfolk Superior Court No._) Boston Globe, March 30, 2000.

In a First Circuit decision, the court awarded damages of $830,000 to the families of two brain cancer patients who died after experimental treatments in 1961. In its opinion, the court rejected the claim by MGH that the doctrine of "charitable immunity" exempted it from the damage cap. It held that the hospital acted ultra vires. "Simply calling human experiments 'research' does not make them 'charitable' no matter the good faith of the physicians." Heinrich v. MGH, et al (U.S. District Court, No. 97-12134) Boston Globe, October 3, 2000.

However, in a case against Northeastern University, a jury awarded 4 million dollars to the parents of a freshman who died after doctors at the school's student health clinic failed to diagnose her rare form of leukemia. A routine blood test probably would have detected the disease. What the jury did not know was that the university, like the hundreds of other nonprofit institutions throughout Massachusetts, is only liable for a small fraction of the damages. (Suffolk Superior Court No._) Boston Globe, February 24, 2000.

LEGISLATIVE PROPOSALS

The charitable immunity law and its monetary cap were designed to protect the funds of institutions that served the public. A typical, early example was a religious order that provided free or low cost medical care to the poor. The current situation is appreciably different. The law applies equally to all nonprofit organizations, including schools, hospitals, churches and museums. Many of these institutions are wealthy and have substantial endowments. In addition, the managers and corporate officers of those institutions are paid substantial salaries that belie the public's common perception of charities. For example, based upon 1998 figures, the chief

executive officers' salaries of the major HMOs in the Commonwealth reflected a for-profit market standard:

- William C. Van Faasen, President of Blue Cross-Blue Shield, $1,224,872;
- Harris Berman, Tufts Health Plan, $1,106,000;
- Batig Maini, Fallon Healthcare, $532,000;
- In 2000, Charles Baker, Jr., Harvard Pilgrim, $500,000.

The current salaries of the CEOs of the major Boston hospitals reflect similar compensation packages.

As a result of recent lawsuits in which injured parties were limited to a twenty thousand-dollar recovery, the law is again under attack. Massachusetts Representative Steven V. Angelo has filed a bill to eliminate charitable immunity. 'Negligence is negligence…and there needs to be more power in the message of a jury." He was acting on behalf of one of his constituents, a Saugus mother, whose 26 year-old, mentally retarded son drowned in the tub of a Lynn group home in 1992. She settled his death case for the statutory cap amount. Boston Globe, February 28, 2000, p. B1. Even Judy Glasser, a spokeswoman for the Massachusetts Hospital Association, acknowledged that the amount of the statutory cap was unfair. "We recognize that a cap set in place several decades ago needs to be re-looked-at and figure out what is appropriate." Associated Press, by Martin Finucane, February 28, 2000.

The battle over the healthcare practices of HMOs has also figured in the charitable immunity debate because they enjoy the statutory protection of the damage cap. Senate Ways and Means Chairman, Mark Montigny has filed a bill that would remove the cap when a person sues an HMO for medical malpractice. His bill would only apply to HMOs, but he is intrigued with the idea of raising the limit for all nonprofits. "I think it is ripe for debate," he said. Associated Press, February 28, 2000.

It is clear that Massachusetts is out of step with the majority of states on this issue. The citizens of the Commonwealth are presently precluded from holding charitable and nonprofit organizations suitably accountable when they cause injury to others. Maintaining the status quo is unfair. The statutory cap should be eliminated.