

THE SHORT LIFE AND LONG AFTER LIFE OF CHARITABLE IMMUNITY IN THE COMMON LAW

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Many people think that charities and other altruistic organisations should enjoy special protection from claims in negligence or special protection from having their assets seized in payment of their liabilities. This is the doctrine of charitable immunity. The doctrine had a brief life in England a century and a half ago and was then abolished. Despite its abolition, however, the concepts, which underlie the doctrine, keep popping up in legal argument, seemingly without recognition that these concepts have been fully considered by many courts throughout the common law world and rejected by them.

This article traces the history of the doctrine and the concepts that gave it life and demonstrates that, since the middle of the nineteenth century, most courts in Great Britain, the United States of America and Canada have recognised that the protection of charitable property from tort liability is purely a matter for public policy and have accepted that no policy sustainable in a democratic society presents itself for doing so. Accordingly, modern law rejects the doctrine, whether it is presented as an application of the law of torts, the law of trusts or the law of charities, and whether it is said to apply to the enterprise, its assets or both.

Bien des gens pensent que les organismes de charité et autres devraient bénéficier d'une protection spéciale contre les réclamations pour faute ou contre la saisie de leurs actifs pour le paiement de leurs dettes. C'est la doctrine de l'immunité des organismes de charité. Cette doctrine a connu une brève existence en Angleterre il y a un siècle et demi, avant d'être abolie. Malgré son abolition, toutefois, les concepts qui soutiennent cette doctrine continuent de refaire surface dans le raisonnement juridique, apparemment dans l'ignorance qu'après avoir été pleinement considérés par bien des tribunaux à travers l'univers de la common law, ils ont été rejetés par eux. Cet article retrace l'histoire de cette doctrine et des principes qui lui ont donné vie; il démontre que, depuis le milieu du 19^e siècle, la plupart des tribunaux de la Grande-Bretagne, des États-Unis d'Amérique et du Canada ont reconnu que la protection des biens d'un organisme de charité contre la responsabilité était purement une question de politique, et qu'il était, dans une société démocratique, impossible de

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trouver une politique acceptable à cette fin. En conséquence, le droit moderne rejette cette doctrine, qu'elle soit présentée comme une application du droit des délits, du droit des fiducies, ou du droit des organismes de charité, qu'elle s'applique à une entreprise, ou à ses actifs, ou aux deux.

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I. Introduction

In one of his more famous witticisms Mark Twain announced “the reports of my death have been greatly exaggerated”. The legal doctrine of charitable immunity has the opposite problem. Though it died a long time ago, the reports of its death have been largely ignored. Recent decisions of the Supreme Court of Canada,² the Courts of Appeal for Ontario,³ British Columbia⁴ and for Newfoundland and Labrador⁵ demonstrate that this is so.

The reports of charitable immunity's death have been ignored for a number of reasons. One is that outside of the United States, no leading text

² *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570.

³ *Re Christian Brothers of Ireland in Canada* (1998), 37 O.R. (3d) 367 (Gen. Div.) rev'd in part (2000), 47 O.R. (3d) 674 (Ont. C.A.) leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 277, application to re-consider refusal of leave dismissed 23 May 2002 (the author is counsel to the Provisional Liquidator of The Christian Brothers of Ireland in Canada (in liquidation)).

⁴ *Rowland v. Vancouver College Ltd.* (2000), 70 B.C.L.R. (3d) 87, aff'd (2001), 205 D.L.R. (4th) 193 (B.C.C.A.), leave to appeal to S.C.C. refused (2002), 211 D.L.R. (4th) vi.

⁵ *John Doe v. Bennett* (2002), 218 D.L.R. (4th) 276 (Nfld. & Lab. C.A.).

on charities, torts or trusts considers the doctrine explicitly.⁶ Therefore, the extensive body of case law on the doctrine is largely unknown by the legal profession outside the United States.⁷ Moreover, outside of the United States, the doctrine has not been the subject of significant academic treatment.⁸

Another reason is that the doctrine rarely presents itself as "charitable immunity". Rather, it usually presents itself as an application of well-

⁶ No non-American text on the law of charities, torts or trusts directly discusses the concepts underlying the case law on charitable immunity and only two Commonwealth texts do so obliquely: H. Picarda, *The Law and Practice Relating to Charities* 3rd ed. (London: Butterworths, 1999) at 496 and G. dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) at 381.

⁷ E.g. [listed chronologically]: "Liability of a Charitable Institution for Torts" Note (1918) 18 Columbia L. Rev. 261; "Liability of Charitable Hospitals for Negligence of their Employees" Note (1919-1920) 18 Michigan L. Rev. 539; "Charities: Exemption of Charitable Organizations from Tort Liability to Beneficiaries" Note (1923) 8 Cornell L.Q. 146; C. Zollman, "Damage Liability of Charitable Institutions" (1920-1921) 19 Michigan L. Rev. 395; "Liability of a Charitable Institution for Nuisances" Note (1922) 22 Columbia L. Rev. 748; L.W. Feezer, "The Tort Liability of Charities" (1928-1929) 77 U. of Penn. L. Rev. 191; "Liability of Charitable Corporations" Note (1928-1929) 2 Southern Cal. L. Rev. 490; "Tort Liability of Charitable Institutions in New York" Note (1939) 9 Brooklyn L. Rev. 78; "Liability of Charitable Corporations and Trusts for Their Torts" Note (1948) 5 Maryland L. Rev. 336; E.M. Ball, "The Liability of Charitable Institutions for Torts of Agents and Servants" (1949-1950) 38 Kentucky L.J. 105; J.E. Eikman, "Tort Liability of Charitable Institutions" (1948) 9 U. of Pittsburgh L. Rev. 253; S.S. Bobble, "Tort Liability of Hospitals in New York" (1952) 37 Cornell L.Q. 419; B.A. Berkman, "Tort Immunity of Charities in Ohio" [1953] Western Reserve L. Rev. 348; "Charitable Institutions - Immunity from Tort Liability" Note (1954) 4 De Paul L. Rev. 56; F.D. Spence, "Is Charitable Immunity on the Way Out?" (1954-1955) 7 South Carolina L.Q. 443; J.J. Simeone, "The Doctrine of Charitable Immunity" (1958) 5 St. Louis U. L. J. 357; "Tort Liability of the Trustee of a Charitable Trust: A Qualified Immunity" Note (1958) 44 Virginia L. Rev. 1317; J.R. Feather, "The Immunity of Charitable Institutions from Tort Liability" (1959) 11 Baylor L. Rev. 86; "The Quality of Mercy: Charitable Torts and Their Continuing Immunity" Note (1987) 100 Harv. L. Rev. 1382; C.R. Tremper, "Compensation for Harm from Charitable Activity" (1991) 76 Cornell L. Rev. 401; M.C. Lear, "Just Perfect for Pedophiles? Charitable Organizations and Their Duty to Screen Volunteers" (1997) 76 Texas L. Rev. 143.

⁸ Cf. [listed alphabetically]: T. Carter, "Case Comment: Christian Brothers Decision Exposes Charitable Trust Assets to Tort Creditors" (2001) 16:1 The Philanthropist 28; M.C. Cullity, "The Charitable Corporation: A 'Bastard' Legal Form Revisited" (2000) 17:1 The Philanthropist 25-26; K.E. Davis, "Vicarious Liability, Judgment Proofing, and Non-Profits" (2000) 50 U. of T.L. J. 407; R. Flannigan, "The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments" (1998) 77 Can. Bar Rev. 73; A.L. Goodhart, "Hospitals and Trained Nurses" (1938) 54 L.Q.R. 533; D.C. Simmonds, "The Trust Within the Charitable Corporation: A Victim of Judicial Policy Making?" (2001) 20 E. T. & P. J. 225; D. Waters, "Special Purpose Trusts and a Corporate Trustee in Liquidation: The Story of Vancouver College and St. Thomas More Collegiate" (2003) 22 E.T. & P.J. 199.

established principles drawn from the law of torts, trusts or charities. In effect the doctrine uses principles drawn from these areas of law to bounce back and forth between asset immunity and enterprise immunity. The early cases held that trust law⁹ prevents charitable enterprises from using their assets to pay damages arising from their indirect fault and therefore the enterprises themselves are immune from claims of vicarious liability. Later cases held that trust law did not prohibit charitable enterprises from being sued for vicarious liability but did prevent their property from being used to pay any resulting liability. Other cases have held that tort law does not permit charitable enterprises¹⁰ to be sued for vicarious liability because their activities could not continue if their liabilities were too great. All of these approaches to immunity have been set aside in leading case law from England, Canada and the United States. Nevertheless, it is not always easy to see that this case law has discredited both asset immunity and enterprise immunity and all forms of each.

The major reason why the death of charitable immunity has been overlooked, however, is because the legal profession does not like what it means: charities, like businesses, must be responsible for their acts and like businesses, charities can fail if their tort liabilities are too great. Since charities cannot pass the costs of their liabilities on to the people who use their services the way businesses can pass their liabilities on to their customers, if charities fail, the people who rely on them are harmed even though they themselves have done nothing wrong. Charitable immunity, then, is driven by the desire to prevent harm to those who benefit from an altruistic enterprise by protecting the enterprise or its assets from tort liability. Such protection comes at a price, though. The people harmed by the enterprise and who would be entitled to damages from it were its objects of a commercial rather than altruistic nature, lose so that the public can gain. Whether those who are harmed by an altruistic organisation should continue to suffer without compensation so that others may gain from its activities is a question of and for public policy, not the law of

⁹ Trusts for charitable purposes are trusts for the public and are known and described as either "charitable trusts" or "public trusts". For example, J. Mowbray, ed., *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) at 1-24 says, "public trusts and charitable trusts may be considered in general as synonymous expressions" and J.E. Martin, H.G. Hanbury and R.H. Maudsley, eds. *Modern Equity*, 13th ed. (London: Stevens & Sons, 1989) at 372 says "[c]haritable trusts are public trusts, and are enforced by the Attorney-General in the name of the Crown".

¹⁰ These are usually described as "charities" or "non-profit organisations". The most accurate description is probably "altruistic" which serves to distinguish the objects and purposes of such bodies from those of a commercial or profit-making enterprise but without getting into technical discussions of whether a body's objects are "charitable" in the strict sense of the word, or if it is truly non-profit. Nevertheless, the following discussion will generally use "charity" to describe these bodies or enterprises, though sometimes where the context seems more appropriate "altruistic", "non-profit" or "public body" will be used instead.

trusts, torts or charities. Charitable immunity has been rejected throughout the common law world because for over 140 years courts have recognised that it is contrary to public policy to allow the public to benefit at the expense of the injured person. In any event, a decision to prefer the public interest at the expense of an individual member of the public is not one the common law can make.

Since the charitable immunity case law is not well known, its application to both asset immunity and enterprise immunity is not well recognised and its roots in public policy are not well understood. Accordingly, it is necessary to consider the doctrine from its genesis in the early nineteenth century and then trace its evolution in Great Britain, the United States and Canada as it bounces back and forth between asset immunity and enterprise immunity. For this reason, the paper proceeds chronologically, rather than thematically.

II. History and Policy of Charitable Immunity in the Common Law

A. Charitable Immunity is Developed and then Rejected in Great Britain

i) Charitable Immunity is Developed in Great Britain

In 1835 James Findlater drove his carriage down an unlit road in Scotland. He hit some stones that had been left in the road by workmen during its construction. The carriage turned over. Findlater was injured and his son was killed. Findlater sued the trustees of the road, who were appointed under an act of Parliament, claiming that they were vicariously liable for the negligence of the workmen.¹¹

Findlater's Case required courts for the first time to decide between two competing legal theories which appeared to give different answers to the question of whether public bodies and their funds could be held accountable in tort. One theory started with the proposition that the law of trusts precludes public trustees from using the trust property under their control to pay damages for vicarious tort liability and concluded that the trustees cannot be sued at all. The other started with the proposition that the law of torts has the same rules for imposing liability on public trustees as it does for anyone else and concluded that if people acting as trustees for the public benefit are directly or indirectly liable for tortious misconduct then the property they control as trustees can be used to pay this liability. To put these theories a slightly different way, one started with the proposition that certain property is immune from attachment in most circumstances and then concluded that the owners of the property could not be sued because the assets were immune from any judgment. The other started with the proposition that any person or body of persons can be sued

¹¹ *Duncan v. Findlater* (1839), 7 E.R. 934 (H.L.).

for tortious wrongdoing and concluded that, because they can be sued, all the property they own can be attached to pay any resulting liability.

At trial, Findlater succeeded in holding the treasurer of the trust funds (representing the trustees) liable for the negligence of the workmen. The treasurer appealed to the House of Lords. In the House of Lords, the case for the treasurer was put by the Attorney-General. He submitted that the action had been brought against the wrong person, that it should have been brought against the workmen who were directly at fault, not the trustees of the road who had not acted negligently. Making the trustees personally liable, the Attorney-General argued, was merely a technique to enable the plaintiff indirectly to get at the property the trustees controlled — the road tolls — when the legislature had not expressly declared that the property could be used for this purpose.¹² Therefore, concluded the Attorney-General, the trial judge's decision had made a trust-fund liable for the negligence of a person who was neither the trustee nor beneficiary of the trust and permitted a person who was not the object of the trust to acquire the trust property. In response, the plaintiff argued that the trustees must be vicariously liable for the negligent acts of those whom they hired, this being a general rule of law, and that if liable, the property they control could be attached to pay this liability.¹³ The House of Lords granted the appeal, thus establishing the doctrine of charitable immunity.

In the House of Lords, Lord Cottenham accepted that the case was to be decided on general equitable principles relating to all trusts. His Lordship said that "when trusts are created, it is plain that for the public benefit that courts should have a common principle of dealing with them".¹⁴ Lord Cottenham concluded that under the statute establishing the toll road and appointing the road trustees, Findlater was not a beneficiary of the trust and therefore could not claim the funds as a beneficiary. Since the statute pursuant to which the funds were raised required the funds to be used for the construction and operation of the road and "to no other purposes whatsoever", His Lordship concluded that the public fund was not liable to provide compensation for the private error of an employee.¹⁵ Rather, the only way that trust property could be used by the defendant trustees to pay for the liability of the negligent workmen would be if the trustees were directly liable to the plaintiff. Since the liability of the trustees in this case could only be indirect, the plaintiff could not obtain redress

¹² *Ibid.* at 936.

¹³ *Ibid.* at 937.

¹⁴ *Ibid.* at 937. Although this comment was made in the context of the alleged difference between Scottish and English law, it was directed towards the question of whether the law of trusts applied to negligence actions against public trustees.

¹⁵ *Ibid.* at 937-38 (*per* Lord Cottenham L.C.). The majority of the Lord Chancellor's speech is technically *obiter* since the operative part of his reasoning is the construction of a statute. Nevertheless, the construction placed on the statute was derived from principles of law, which, if correct, would be generally applicable.

from the trust funds. Accordingly, the court held, Findlater could not claim damages from the funds and thus could not sue the trustees at all. Were that not so, His Lordship observed, "the result would be that all the damages, though not arising from any act done by the immediate authority of the road trustees, would be liable to be compensated out of the trust fund; a proposition which certainly cannot be supported by the law which regulates the liability of master and servant".¹⁶ Lord Brougham agreed.¹⁷ The Lord Chancellor did not cite any authority for these propositions, probably because he felt them to be unexceptional.

Duncan v. Findlater rests on two propositions. The first proposition is that a plaintiff cannot sue a defendant at law if equity will not permit the plaintiff to attach the defendant's property in satisfaction of the judgment. The second is that equity will not permit a plaintiff to attach trust funds to pay legal damages unless the trustees were personally at fault in the administration of the property. These propositions were drawn from the law governing private trusts, and in particular those principles of equity that determine when trustees can indemnify themselves from the assets under their administration. The House of Lords assumed that the trustee indemnity principles applied equally to property held in trust for the benefit of the public and for property held in trust for a beneficiary. It is this assumption that gave the doctrine of charitable immunity its life.

Though the House of Lords did not in *Duncan v. Findlater* explain why equity protects the property of a public trust from tort liability like it protects the property of a private trust, they provided such an explanation a few years later, in *Feoffees of Heriot's Hospital v. Ross*.¹⁸ In *Heriot's Hospital*, a Mr. Ross sued the trustees of a hospital endowed "in perpetuity" by a Mr. Heriot for damages arising from the trustee's refusal to allow Mr. Ross to attend the institution. Although Mr. Ross did not sue for payment of damages out of the trust fund, it was understood that if there were any damages to be paid they must be paid from these funds. The case reached the House of Lords on a point of pleading – whether the claim was supportable in law – where the appeal was heard by a panel including Lords Cottenham and Brougham. On the authority of *Duncan v. Findlater*, their Lordships summarily dismissed Mr. Ross' claim.

Lord Cottenham, applying his own reasoning from *Duncan v. Findlater*, held as follows:

The question then comes to this, - whether by the law of Scotland a person who claims damages from those who are the managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any

¹⁶ *Ibid.*

¹⁷ *Ibid.* at 939 (*per* Lord Brougham).

¹⁸ (1846), 8 E.R. 1508 (H.L.).

person who ever created a trust fund that provided for payment out of it of damages to be recovered by those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.¹⁹

Lord Brougham, who had agreed with Lord Cottenham in *Duncan v. Findlater*, said, "it is much to be regretted, though the suit was instituted before the case of *Duncan v. Findlater* was decided, that the court did not, when that case had been decided, pay any attention to that decision, which authoritatively lays down the law".²⁰ Lord Campbell came to the same conclusion, though he expressed his views in much stronger language:

I cannot help feeling great astonishment that such a notion should have prevailed in Scotland. It seems to have been thought, that if charity trustees are guilty of a breach, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated.²¹

The House of Lords reasoned that a court of equity will protect property held on a public trust like property held on a private trust because (i) the settlor of a trust for a charitable purpose is presumed to intend that the trust so established not be used to pay liabilities and because (ii) it would be a misapplication of the property held in trust to pay damages to those who could not be regarded as falling within the class of those who were to benefit from the charitable activity, such as the plaintiff in that case.²²

These, of course, are different reasons than those which explain why the property of a private trust is ordinarily protected from the wrongdoing of the trustee or its agents and servants. In the case of a private trust, it is the fact that equity regards the property held in trust as the property of the beneficiary that explains why the trust property is ordinarily immune from the trustee's liabilities. Equity will permit the trustee's creditors access to this property only where equity regards the trustee's liabilities as properly the responsibility of the beneficiary. Naturally, this explanation does not apply to a public trust because no one other than the trustee has any property rights in the property subject to the trust. Therefore, the immunity

¹⁹ *Ibid.* at 1510.

²⁰ *Ibid.* at 1518.

²¹ *Ibid.* at 1512.

²² These principles, even if they were established at the time of Lord Cottenham's speech, were, in the case of private trusts, rejected in 1862 by *Bennett v. Wyndham* (1862), 4 DeG. F. & J. 259, 135 R.R. 132 (C.A.) which held that a person injured by the negligence of workmen hired by a private trustee could directly claim against the property held in trust.

of property held on a public trust has to be supported by factors other than the distinction between a trustee's and a beneficiary's rights in the trust property.²³

In *Heriot's Hospital*, the House of Lords supported such immunity by relying on two factors: the intention of the donor and the nature of the trust. However, their Lordships did not take the next step and explain why these factors were supportable either legally or factually. For example, what was the legal or factual basis of the presumption that the donor of property for a charitable purpose intends that the property not be used to pay liabilities? And if the donor did intend such a result, why should his or her intention govern? Why does it matter that the donor gives the property "in trust" for charitable purposes as opposed to an outright charitable gift? Furthermore, why is it that payment to an injured stranger to a charitable trust violates the trust? And if payment to a stranger violates the trust, would payment to an injured person who was the object of the trust also violate the trust? In fact, the factors that Lord Cottenham articulated and the House of Lords relied upon are not based on legal or equitable principles at all. They are simply rationalisations for an unstated choice in public policy: that it is better to protect a charity's assets from the claims of those harmed by the charity's servants than to allow those assets to be dissipated in payment of damages. A charity's immunity from being sued and its immunity from having its assets attached in satisfaction of a tort judgement are simply the two sides of this policy.

Heriot's Hospital was not subsequently considered in English law by name but the principles for which it stands were read into *Duncan v. Findlater* which was then used as the controlling precedent in the common law courts.²⁴ The first case in which this occurred was *Holliday v. St. Leonard's, Shoreditch*,²⁵ an action brought in the Court of Common Pleas alleging that municipal trustees were liable for the negligence of workmen who had permitted stones to remain on an unlit road. The Chief Justice of the court relied on *Duncan v. Findlater* for the principle that persons entrusted with a public duty and who perform that duty gratuitously are exempted from the negligent acts of those whom they hire. Tellingly, the Chief Justice stated that "it was agreed on all hands" that had this case involved a private individual employing workmen who had acted negligently the employer would have been liable. The Chief Justice accepted that the immunity of persons entrusted with a public duty was an established principle, stating "*Hall v. Smith* is cited as the first of a series of authorities ending with *Duncan v. Findlater* where that principle of the

²³ This theme is explored more fully in D.R. Wingfield, "The Attachment of Charitable Property at Law and in Equity" (forthcoming).

²⁴ Through inadvertence, happenstance and oversight *Heriot's Hospital* was destined to become the seminal case in favour of charitable immunity in the United States: see Section B, below.

²⁵ (1861), 142 E.R. 769.

exemption of public trustees has been fully recognized".²⁶ Therefore, the court accepted that the normal rules for imposing liability for negligence did not apply to public trustees.

The next significant decision in favour of charitable immunity was *Coe v. Wise*.²⁷ This was an action brought in the Court of Queen's Bench by a farmer against the clerk of drainage commissioners for negligently permitting the construction of a channel which had allowed tidal waters to submerge the farmer's fields. The court (Cockburn C.J. and Mellor J.), relying on *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch*, held that the commissioners were not liable. Although the decision was later reversed on appeal,²⁸ the judgments in this case reveal the difficulty in applying the charitable immunity doctrine.

The plaintiff in *Coe v. Wise* accepted that, in principle, charities can be immune from negligence, but argued that the immunity arose only when the services were provided gratuitously, which was not the case when a public body – such as the drainage commissioners in this case – were empowered to charge for their services. This was a logical interpretation of *Duncan v. Findlater* based on the description of the principle of that case found in *Holliday v. St. Leonard's, Shoreditch*. Cockburn C.J. rejected this interpretation, however. Rather, His Lordship found that "the main criterion in these cases is whether there is any fund at the disposal of the public trustees or commissioners available for the payment of damages in respect of injury occasioned by negligence".²⁹ In other words, unless the public trustees had the right to spend a fund under their control to pay damages, the plaintiff could not sue them in tort. His Lordship explained that public trustees did not have the right to use this property to pay the plaintiff's damages, because the property in their hands had been appropriated to "specific objects" that did not include the payment of damages. Therefore, the trustees could not be held liable in their "aggregate or quasi corporate character".³⁰ In response to the suggestion, to be echoed by the Court of Appeal forty-five years later,³¹ that the Plaintiff should still have been entitled to bring his action and obtain a judgment – even if the judgment were of no effect – His Lordship said, "a result so absurd in itself is a strong ground for applying the principle of total immunity to such a case".³²

²⁶ *Ibid.* at 204 (internal citations omitted).

²⁷ (1864), 5 B. & S. 438 (Q.B.).

²⁸ Reported in (1866), L.R. 1 Q.B. 711 (Ex.Ch.), following the decision of the House of Lords in *Mersey Docks v. Gibbs*, *infra*, note 43.

²⁹ *Supra* note 27 at 471.

³⁰ *Ibid.* at 471-72.

³¹ *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820 (C.A.).

³² *Coe v. Wise*, *supra* note 27 at 476 (emphasis added).

Mellor J. came to the same result but supported his result with a different analysis. His Lordship framed the question that the court had to decide as: When can charitable of public trustees can be made liable in tort? Implicit in His Lordship's formulation of the question was the proposition that if the trustees or body can be, and are, held liable then the property they hold can be attached to pay the judgment. Also implicit in this question is the proposition that different rules apply in tort if the defendant is a charity. Based on the principles of a number of cases, including *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch*, His Lordship concluded that the liability of public trustees in tort could arise in three circumstances only: firstly, where they exceeded or abused their powers; secondly, where they breached their duty by directly ordering the act causing the damage; and thirdly, where the object of their activity is the carrying on of works or services for reward even though not for private gain.³³ Mellor J. found that none of these circumstances arose in this case.

Mellor J.'s analysis of these cases only begs the question; it does not answer it. Why is it that the property of trustees or a public body can be seized if they acted illegally but not if they acted innocently; if they directly caused the harm but not if they did so indirectly; or if the public paid directly for the service that caused the harm but not if the public paid for this service indirectly? No reason was given for why this is so and, on the face of it, there is no such reason. These principles simply disguise a policy decision to limit the exposure of charitable assets to those harmed by the charity.

Cockburn C.J. analysed the issue of liability by asking whether the drainage commissioners were immune from liability in the circumstances of this case. His Lordship held that *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch* established that:

persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of the persons employed by them can be made, are exempted from liability in respect of such negligence.³⁴

In modern parlance this would mean that a non-profit or charitable organisation is exempted from vicarious liability for the unauthorised acts of the organisation's agents or employees.

Blackburn J. dissented from this judgment. His dissent foreshadows the prominent, and perhaps crucial, role he was to play in the eventual abolition of the doctrine of charitable immunity. He opined that the commissioners had an absolute duty to maintain the works, and were

³³ *Ibid.* at 453.

³⁴ *Ibid.* at 467.

accordingly liable for the negligent performance of that duty by their employees.³⁵ His Lordship doubted whether the principles of *Duncan v. Findlater* and *Holliday v. St. Leonard's, Shoreditch*, were binding on the court in *Coe v. Wise* and he recognised that a number of subsequent cases doubted the principles.³⁶ In other words, Blackburn J. believed that there should be no difference in law between liability for the negligence of a private body and a public body.

Therefore, by 1864 in Great Britain it was accepted that *Duncan v. Findlater* (as interpreted by the House of Lords in *Heriot's Hospital*, the Court of Common Pleas in *Holliday v. St. Leonard's, Shoreditch*, and the Court of Queen's Bench in *Coe v. Wise*) had established the principle that charitable organisations were totally immune from claims in negligence. The immunity of such organisations was explained and justified on the basis that the property owned by such an organisation was held by it in trust for the specific purpose for which it was dedicated, and thus the organisation could not use the property for any other purpose – such as the payment of damages in tort – as such use would amount to a breach of the terms of the trust or defiance of the donor's intention. In other words, the courts of Great Britain accepted that charitable property enjoyed immunity from claims in negligence and that therefore the charitable enterprise did too.

Whether by accident or design, this analysis of a charity's immunity from negligence was infused with the reasoning that underlay the immunity of business organisations from some contractual liability. Nineteenth century courts believed that, because a corporation's property was dedicated by the corporate charter to specific uses,³⁷ this property was trust property, held either by the corporation in trust for its members or by the corporation's directors in trust for the corporation. By 1860, for example, it was "not disputed and cannot be denied" that monies belonging to a company were held in trust for their shareholders.³⁸ Perhaps the clearest statement of this principle is found in *Russell v. Wakefield Waterworks Company* where Jessel, M.R. said:

In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes.³⁹

³⁵ *Ibid.*

³⁶ *Ibid.* at 462-63.

³⁷ It was immaterial whether the corporate charter was established by a general or private statute or by a memorandum of association.

³⁸ *Ernest v. Croysdill* (1860), 45 E.R. 589 (Ch. App.) per Knight-Bruce and Turner L.JJ.

³⁹ (1875), 20 Eq. 474 at 479 (per Jessel M.R.), app'd *Selangor United Rubber Estates Ltd. v. Craddock* (No. 3), [1968] 2 All E.R. 1073 (Ch. D.) at 1094 (per Ungood-Thomas J.).

This idea seems to have arisen out of the fact that before 1844 most joint stock companies were unincorporated and their validity depended on a deed of settlement vesting the property of the company in trustees.⁴⁰ It therefore seemed natural to treat incorporated bodies the same as unincorporated bodies, treating the directors of each as trustees and the property of the company as trust property. Likewise, before charitable corporations became common, charities were organised under express trusts and a board of trustees usually held a charity's property. Therefore, courts treated the property of a public body as trust property, whether or not the body was comprised of natural persons holding the property on an express trust (like in *Heriot's Hospital*) or was an incorporated body acting through statutory trustees (like in *Duncan v. Findlater* or *Holliday v. St. Leonard's, Shoreditch*).

Nineteenth century courts also accepted that all corporate bodies were under some legal disability with respect to the use of their property arising from restrictions in their corporate charters. This is the principle of *ultra vires*.⁴¹ Therefore, all persons (whether natural or corporate) holding property for shareholders or for the public were bound to use the property only for the restricted purposes for which they held it. Accordingly, the idea that a charity is legally incapacitated from using its property to pay claims arising from the negligence of its servants was simply an application of the doctrine of *ultra vires* to a charity. The rights of third parties, such as persons contracting with or acquiring property from business corporations or persons injured by charitable bodies, were affected by these restrictions, too. It made no difference to the operation of the doctrine that the restrictions were in nature charitable or private; what mattered is that the restrictions existed at all.

In the case of a body (such as the statutory trustees in *Duncan v. Findlater* or the feoffees of Heriot's hospital) holding property for public purposes, the restrictions were found in the intent of the person who endowed the body with its property. So, for example, the Legislature's intent in raising funds for the construction and operation of the road in *Duncan v. Findlater* or Mr. Heriot's intent in endowing the hospital in *Heriot's Hospital* restricted the use to which the body holding the property could put it just as much as a corporate charter established by an Act of the Legislature or by a memorandum of association restricted the use to which the trustees of a business corporation could put the corporate property. Consequently, it was accepted on all hands that the founders of these bodies could restrict the trustees' ability to use the property under their control to pay tort liability. For this reason, it was accepted that the question of whether the property could be so used was to be answered by a Court of Equity on trust principles, not a Court of Law on tort principles.

⁴⁰ P.L. Davies, ed., *Gower's Principles of Modern Company Law*, 6th ed. (London: Sweet & Maxwell, 1997) at 598-99.

The debate in the cases on charitable immunity thus became a debate over whether the payment of damages to an injured person was comprehended by the purposes for which the body held its property. The decision that the trustees or managers of public property could not use the property to pay negligence claims simply flowed naturally from the conclusion that the body's scope of lawful action did not permit such a use and that the body's managers were obligated as trustees to apply the property under their control only for the body's limited purposes. Once this decision was made it was therefore inevitable that the trustees should be immune from the action itself.

ii) *Charitable Immunity is Rejected in Great Britain*

Duncan v. Findlater and the principles espoused by Lord Cottenham in *Heriot's Hospital* did not have a long life. Two years after *Heriot's Hospital* was decided the House of Lords expressly rejected these principles. The case that did so was actually two appeals from the Court of Exchequer Chamber,⁴² which in separate cases, *Mersey Docks and Harbour Board Trustees v. Gibbs* and *Mersey Docks and Harbour Board Trustees v. Penhallow*,⁴³ had considered charitable immunity.

In both the *Gibbs* and *Penhallow* cases, ships entering a dock owned and managed by the trustees of the Mersey Docks and Harbour Board struck a sandbank, damaging their cargoes. In the first case, in the Court of Exchequer, the owner of the cargo, Gibbs, sued the trustees for negligently managing the docks. The trustees defended on the ground that in law they were not liable because they were public trustees. The Court of Exchequer, believing itself bound by a previous decision of the Court of Exchequer Chamber, *Metcalfe v. Hetherington*,⁴⁴ which had held that public trustees are not liable for the acts of their employees, dismissed Gibbs' action on the pleadings. Gibbs appealed to the Court of Exchequer Chamber, which

⁴¹ *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653 at 694 (*per* Lord Selborne). In the early twentieth century this principle was held not to apply to corporations incorporated by letters patent issued by or under the authority of the Crown: *Bonanza Creek Mining Co. v. R.*, [1916] A.C. 566 (P.C.).

⁴² At this time, three common law courts, Queen's Bench, Common Pleas and Exchequer, heard matters at first instance. The court of appeal for all three was the Court of Exchequer Chamber, a statutory court under 11 Geo. IV & Will. IV, c. 70. All the judges of each of the three courts (fifteen judges in total) could sit in Exchequer Chamber, except that an appeal from one court would be heard only by judges of the other courts: see T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth & Co., 1956) at 210.

⁴³ Both cases are reported as *Mersey Docks v. Gibbs*, [1861-73] All E.R. Rep. 397.

⁴⁴ (1860), 5 H. & N. 719, on appeal from 11 Ex. 256. Without expressly relying on any authority Cockburn C.J. had held at 724 "A body of persons such as the defendants cannot individually superintend the work but must act by their servants. Assuming it to be made out that there was such negligence on the part of the harbour master, can it be said that there was such negligence on the part of the trustees as to make them responsible?"

reversed the decision of the Court of Exchequer. In doing so, Exchequer Chamber ignored *Metcalfe v. Hetherington*.

Penhallow, who also sued the trustees for negligence, owned the cargo in the second case. The trustees defended this action, also on the ground that, being public trustees, in law they were not liable for Penhallow's losses. Penhallow's case was tried before a different judge of the Court of Exchequer, who directed that should the jury's opinion be that the trustee's employees were negligent, the jury must find the trustees vicariously liable. The trustees filed a bill of exceptions to this ruling. The bill was granted, resulting in judgment for the trustees. Penhallow appealed to the Exchequer Chamber, which over-ruled the bill and confirmed the judgment of the Court of Exchequer.

In both cases the trustees appealed to the House of Lords. Six judges, two from each of the common law courts, and three Lords of Appeal in Ordinary, Lord Cranworth L.C., Lord Wensleydale and Lord Westbury, heard the appeal. It was obvious that the appeal raised a fundamental issue: whether the law should have one set of rules for the tortious liability of the owners and managers of private property and for the attachment of such property in payment of a judgment, and another set of rules for the tortious liability of the owners or managers of charitable property and for the attachment of charitable property in payment of a judgment. Given the importance of this issue, and the *dictum* of Lord Cottenham in *Duncan v. Findlater*, their Lordships solicited the opinion of the common law judges on whether Gibbs' case stated a good cause of action and whether the judgement of the Court of Exchequer Chamber in Penhallow's case was right. On behalf of the common law judges, Blackburn J. answered both questions in the affirmative.

Writing for the judges, Blackburn J. described the issue in this way: "what is the duty which the general law does cast upon a corporation, being the proprietors of docks maintained under such enactments?"⁴⁵ Their answer was that, in the absence of language in legislation that clearly provided the contrary, the rule of construction of the enabling legislation of the harbour board is that "the body, the creature of the statute, shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose on a private person doing the same things".⁴⁶ Accordingly, the fact that the body, whether it is a corporation or board of trustees, holds property as trustee for the public is immaterial to its liability for the negligence of its employees. Importantly, the emphasis on the rights and obligations of a private person removed the artificial restriction that earlier courts had placed on a charitable body's use of its property arising from the "purposes" for which the body held the property.⁴⁷ After all, a

⁴⁵ *Mersey Docks v. Gibbs*, *supra* note 43 at 402 (per Blackburn J.).

⁴⁶ *Ibid.* at 402H, 403I-404A.

⁴⁷ Interestingly, a few years after writing this opinion, Blackburn J. wrote the leading

natural person cannot claim that his property is immune from liability because he owns his property for "purposes" unconnected to his wrongdoing, so why should artificial persons be able to do so? The judges recognised, however, that their opinion, though supported by "a considerable number of cases",⁴⁸ was contrary to others. Notable amongst these other cases was *Duncan v. Findlater*, *Holliday v. St. Leonard's, Shoreditch* and *Metcalf v. Hetherington*.⁴⁹

Blackburn J. also considered whether Lord Cottenham's *dictum* from *Duncan v. Findlater* was correct, recognising that should that *dictum* accurately state the law, then all persons incorporated for the purpose of executing works and holding the works as trustees, would, as a practical matter, be immune from direct or indirect liability for negligence.⁵⁰ Blackburn J. had this to say about Lord Cottenham's statement:

Lord Cottenham is there speaking of a body of trustees acting under the Scottish Turnpike Act, but his reasoning is general. The dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scottish Case but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.⁵¹

Therefore, although the common law judges recognised that Lord Cottenham's reasoning represented bad public policy, which they declined to follow, in light of the state of authorities on this point the judges left it to the House of Lords "to decide on which side the preponderance of authority lies".⁵²

In the House of Lords, Lord Cranworth L.C. stated that the appeal would decide whether a body constituted like the Mersey Docks and Harbour Board could be found liable in negligence; in other words, the House of Lords was going to determine if trustees holding property for the benefit of the public could be found liable for direct or indirect tortious wrongdoing, if at all.⁵³ The Lord Chancellor started from the premiss that a body established by statute to operate docks, but having the right to levy

judgement for the Court of Exchequer Chamber in *Ashbury Railway Carriage and Iron Co. v. Riche* (1874), 9 Ex. 254, permitting shareholders to ratify a contract made by a corporation outside of its corporate powers, thereby severely truncating the scope of the doctrine of *ultra vires*. It was this judgement which the House of Lords reversed, (1875), L.R. 7 H.L. 653, thereby entrenching the doctrine.

⁴⁸ *Supra* note 43 at 405G.

⁴⁹ *Ibid.* at 405I.

⁵⁰ *Ibid.* at 407I.

⁵¹ *Ibid.* at 408C.

⁵² *Ibid.* at 405I.

⁵³ *Ibid.* at 410G, 1 (*per* Lord Cranworth L.C.).

tolls for its own profit would be liable to any person suffering damage by reason of the negligent repair or operation of the works. His Lordship observed that the only difference between a for-profit undertaking of this nature and the Mersey Docks and Harbour Board was that the Board “do not collect tolls for their own profit, but merely as trustees for the benefit of the public”.⁵⁴ His Lordship concluded that this factual difference made no difference to the general principles governing liability in tort; he therefore agreed with the opinion of Blackburn J:

It would be a strange distinction to persons coming with their ships to different ports of this country that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not, such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.⁵⁵

Lord Wensleydale and Lord Westbury also agreed with the opinion of Blackburn J. However only Lord Westbury dealt directly with the principles espoused by Lord Cottenham L.C. in *Duncan v. Findlater* and, in particular, with the theory that the tort victim’s right of recovery was affected by whether the body sought to be made liable was a trustee of property for charitable purposes. Lord Westbury’s speech is a very important and, unfortunately, frequently overlooked statement of the principles governing the rights of creditors to property held in trust.

I can well divine what was at that time passing in the mind of my Lord Cottenham. He seems to have thought that, if a corporation be trustees of property for the direct benefit of certain individuals and there is no other corporate property, and if in their capacity as trustees an act is done by order of the corporation which amounts to a tort or trespass and gives a right of action and a right to damages to any private individual, a court of equity would not permit an execution to issue on any judgment that might be recovered against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries and that the corporation as trustees have no interest therein. But my Lords, I apprehend that was a misapprehension on the part of my noble and learned Lord, and that it would lead to very mischievous consequences.

[...]

Those observations of Lord Cottenham, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were recognised as the law, undoubtedly lead to a very great evil and injury.⁵⁶

⁵⁴ *Ibid.* at 410I.

⁵⁵ *Ibid.* at 410I-411A.

⁵⁶ *Ibid.* at 412I-413D (*per* Lord Westbury).

Although His Lordship did not specify the nature of the failure of justice or the type of great evil and injury that would otherwise occur, it is not difficult to fathom what he meant: if the law was as described by Lord Cottenham, an injured person would be denied recovery in order to preserve the trust or corporate property for the public benefit. His Lordship recognised that this result would be contrary to public policy.

Lord Westbury accepted that the purposes for which the responsible party holds its assets should not determine whether that party can be held liable for wrongdoing or determine whether its assets can be used to pay for that wrongdoing. Since a Court of Law will give an injured person with a judgment against a tortfeasor recourse against the tortfeasor's property to satisfy the judgment, why should that person be denied such recourse by a Court of Equity solely because the tortfeasor is a trustee for the benefit of the public? Lord Westbury did not think that any legal or policy rationale supported equity's reaching a different result than did law. Instead, His Lordship held that the ordinary legal rules of liability and rules governing the attachment of the wrongdoer's assets are not set aside in equity merely because the tortfeasor owns or holds property for charitable or other public purposes.

In short, the debate in the House of Lords over *Duncan v. Findlater* was really a debate about whether the liability of public trustees and hence of the property they control is to be decided by rules of law relating to torts or principles of equity relating to trusts. In *Duncan v. Findlater* the House of Lords had characterized the issue for decision as: when can a person who was not harmed by the direct action of trustees satisfy his damages from the property held by the trustees in trust? This is a question for the law of trusts. In *Mersey Docks v. Gibbs* the common law judges characterized the issue for decision as: does the law have different rules for liability depending on whether the responsible party holds property for the public benefit or for private gain? This is a question for the law of torts. By their decision in *Mersey Docks v. Gibbs*, the House of Lords accepted that the liability or immunity of public bodies and their property was to be decided by the law of torts, not the law of trusts, in other words, by the rules of law governing legal liability not the principles of equity governing the duties of trustees. Therefore, whether a body holds its property beneficially or on trust for charitable purposes is immaterial either to its liability or its obligation to use all of its property – including the property it holds on a public trust – to pay this liability. In effect, the House of Lords concluded that public policy did not permit enterprises existing for the benefit of the public to be immune from liability for their direct and indirect negligence, and therefore, the property used by such enterprises in their public mission could not be immune from being used to pay the damages arising from such liability.

The first case to consider charitable immunity after the decision in *Mersey Docks v. Gibbs* was the appeal of *Coe v. Wise*,⁵⁷ which had been stood over until the House of Lords reached its decision in *Mersey Docks v. Gibbs*. Following that decision, the Court of Exchequer Chamber gave its judgment on the appeal. The judgment was given by Erle C.J. (who had previously given the judgment in *Holliday v. St. Leonard's, Shoreditch*), Willes J., Channell B. and Pigott B. (each of whom, along with Blackburn J., sat on the appeal and concurred in the opinion to the House of Lords in *Mersey Docks v. Gibbs*). Naturally, on the strength of *Mersey Docks v. Gibbs*, Exchequer Chamber reversed the earlier decision of Cockburn C.J. and Mellor J., holding that:

The judgment, therefore, of the court below is reversed by reason of this decision in the House of Lords [*Mersey Docks*]; and we further hold that the action is maintained for the reasons stated by Blackburn J., in this case in the court below. The authorities are so thoroughly examined, and the law deduced therefrom is so clearly and precisely stated by that learned judge on those two occasions, that we think it best to accept his terms and concur in his conclusions...⁵⁸

A few years after judgment of the appeal in *Coe v. Wise*, the issue of charitable immunity was again before British courts in an Irish case, *Levingston v. The Guardians of the Poor of the Lurgan Union*⁵⁹ and an English case, *Foreman v. Mayor of Canterbury*.⁶⁰ The more important of these cases was *Foreman v. Mayor of Canterbury*. The facts of this case were similar to *Duncan v. Findlater and Holliday v. St. Leonard's, Shoreditch*. Workmen employed by a local board of health negligently left a heap of stones by the side of an unlit road. While riding in his cart, the plaintiff hit the stones and was injured. The case was tried before the Court of Common Pleas, which found for the plaintiff. The municipality of Canterbury, through its officers, appealed to the Court of Queen's Bench on the authority of *Holliday v. St. Leonard's, Shoreditch*, which had held that a body like the local board of health, who were made surveyors of highways, were not responsible for the negligence of their employees.⁶¹ The judgment of the Court of Queen's Bench was given by Blackburn J. Not surprisingly, he held that *Holliday v. St. Leonard's, Shoreditch* was over-ruled by the House of Lords in *Mersey Docks v. Gibbs*:

It [*Holliday v. St. Leonard's, Shoreditch*] is not overruled by name; but the principle upon which that case was decided in the House of Lords does overrule it, because it was decided that a public body like the local board of health are answerable for the

⁵⁷ (1866), L.R. 1 Q.B. 711 (Ex. Ch.).

⁵⁸ *Ibid.* at 720-21.

⁵⁹ (1868), 2 I.R.C.L. 202 (Exch. Cham.), which applied *Mersey Docks v. Gibbs* and *Coe v. Wise* in holding public trustees liable for the negligent discharge of sewage.

⁶⁰ [1871] L.R. 6 Q.B. 214.

⁶¹ *Ibid.*

negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose.⁶²

Although *Heriot's Hospital* was not mentioned in *Mersey Docks v. Gibbs*, *Coe v. Wise* or *Foreman v. Mayor of Canterbury*, these cases demonstrate that *Mersey Docks v. Gibbs* over-ruled *Heriot's Hospital* too. In *Mersey Docks v. Gibbs*, six judges, representing the three common law courts and three Lords of Appeal in Ordinary, agreed that the principles espoused by Lord Cottenham in *Duncan v. Findlater*, which formed the basis of the Lord Chancellor's reasoning in *Heriot's Hospital*, were bad public policy and therefore not part of the law of Great Britain. The courts in *Coe v. Wise* and *Foreman v. Mayor of Canterbury* accepted that *Mersey Docks v. Gibbs* stands for the propositions that persons or bodies holding assets for charitable or public purposes are liable like persons holding property in a private capacity, and that the property they hold is exigible in the same way as property owned privately. These propositions are the opposite of those found in *Heriot's Hospital*. Thus, *Heriot's Hospital* must be taken to have been over-ruled by *Mersey Docks v. Gibbs*. Courts in Canada, and generally in the United States of America, too, accept that *Heriot's Hospital* was over-ruled by *Mersey Docks v. Gibbs*.⁶³

The last British case in the nineteenth century to consider charitable immunity was an 1886 decision of the Court of Queen's Bench on appeal, *Gilbert v. Corporation of Trinity House*.⁶⁴ This case considered whether it would make any difference to the liability of a charitable organisation that its negligence arose out of the operation of one of a number of discrete assets under its management. Ironically, the court considered this issue in the context of the Mersey Docks and Harbour Board Commission by querying whether the settled liability of that board for negligence would have been any different had the commissioners of the board been amalgamated into one commission with the commissioners of any number of docks. The court held that it would not make any difference. Without citing any authority⁶⁵ the court first held that charities are not immune from liability by reason of their public character:

The law is plain that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether he be a corporation or an individual who

⁶² *Supra* note 60 at 218.

⁶³ E.g. *Re Christian Brothers of Ireland in Canada*, *supra* note 3; *President and Directors of Georgetown College v. Hughes*, 130 F. 2d 811 (C.A.D.C. 1942) at 815-16.

⁶⁴ (1886), 17 Q.B.D. 795 (*per* Day J.)

⁶⁵ However, *Mersey Docks v. Gibbs* and *Coe v. Wise* were cited in argument.

has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or his servants.⁶⁶

Then the court held that this principle applied with equal force whether the charity owned one or many assets or whether its liability arose out of its management of one or many:

Now to my mind it would have made no difference...if the Commissioners for the Mersey Docks had been amalgamated into one commission with the commissioners of any number of other docks. It is not because they have more duties to discharge that they are less liable for the consequences of their negligence. It is not because they have more opportunities of doing wrong that they are to be less liable to make compensation for the wrong when they have done it. In the same way I can see no difference in the liability of persons who have undertaken the discharge of duties in respect of 50 or 500 lighthouses than if they have undertaken the discharge of duties in respect of one.⁶⁷

As a result of this decision, the fact that property might be held in one or more public purpose vehicles (such as on separate charitable trusts) would make no difference to the liability of the public entity or to the requirement that that entity use any or all of the property under its control to pay its tortious liability.⁶⁸

Therefore, by the close of the nineteenth century, courts in Great Britain accepted that bodies – whether corporate or natural – holding property for the benefit of the public were as liable in tort and their property as answerable for judgments in tort as were bodies holding property for their own benefit, and that this was so whether the liability arose out of the ownership of one or more assets under their control. Accordingly, by the end of the nineteenth century British courts had decisively and comprehensively rejected *both* asset immunity *and* enterprise immunity for charitable or other public purpose bodies and their assets, and did so whether the enterprise was conducted in the form of a corporation or a trust.

iii) *Charitable Immunity is Partially Restored in England, but only for a Short While*

In the twentieth century the English Court of Appeal partially restored the doctrine of charitable immunity, despite recognising that it had been rejected in the nineteenth. In *Hillyer v. Governors of St. Bartholomew's Hospital*,⁶⁹ the Court of Appeal accepted as settled law the proposition that a public body is “liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances...”⁷⁰

⁶⁶ *Supra* note 64 at 799-800 (*per* Day J.).

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 800.

⁶⁹ *Supra* note 31.

⁷⁰ *Ibid.* at 825 (*per* Farwell L.J.).

But the court went on to question (though not on the basis of any authority) whether the property of a public body was immune from liability for its negligence: "The extent to which their property can be made liable to execution is another question and does not arise here".⁷¹

Thus the Court of Appeal simply re-ordered Lord Cottenham's tautology. Lord Cottenham had assumed that the property of a public trust was not exigible in the same manner as private property and from this assumption concluded that persons managing a public trust could not be made liable in the same manner as persons managing private property. The Court of Appeal accepted that these people were liable in the same way, but doubted whether the property of the public trust was exigible in the same manner as private property, thus making the issue of liability moot. The Court of Appeal therefore missed entirely the point of *Mersey Docks v. Gibbs*: once it is accepted that a charitable body is liable like a private body, then the judgment creditors of the charitable body have the same rights to the property of the charitable body as they would to privately- owned property.

The Court of Appeal did accept, though only implicitly, that whether a charitable body can be sued in tort and whether its assets can be used to pay a tort judgment are merely two sides of the same issue. Thus, in order to protect the charitable property from being attached by a judgment creditor, it became necessary to limit directly a plaintiff's right of action – which was the same approach taken by the House of Lords in *Heriot's Hospital*. To do so, Kennedy L.J. implied as a matter of law a contractual term between the patient and the public hospital by which the patient waived the right to sue for negligence in exchange for being treated.⁷² This is the doctrine of implied waiver – the doctrine of charitable immunity by another name. By law the charitable enterprise is contractually rendered immune from any claims of negligence to ensure that the enterprise's charitable assets are protected from the consequences of its direct or indirect negligence.

The doctrine of implied waiver was applied in a number of cases of hospital negligence in England, until the Court of Appeal rejected the doctrine in 1951. The case that did so was *Cassidy v. Minister of Health*.⁷³ Lord Justice Denning held: "this error – for it was undoubtedly an error – was due to a desire to relieve the charitable hospitals from liabilities which they could not afford".⁷⁴ Denning L.J. accepted that the source of the error was the erroneous assumption that the public interest in the continuation of an altruistic enterprise could be preferred over those individual members of the public harmed by the enterprise.

⁷¹ *Ibid.*

⁷² *Ibid.* at 828-29.

⁷³ [1951] 2 K.B. 343 (C.A.) (*per* Denning L.J.).

⁷⁴ *Ibid.* at 360-61.

Although one would think that by the 1950's the doctrine of charitable immunity had left the legal mind-set in Great Britain for good, it did not do so. Instead, the principles found in *Duncan v. Findlater* and *Heriot's Hospital* are still accepted as the law pertaining to the exigibility of charitable property in some quarters. For example, the 2001 edition of *Halsbury's* chapter on charities relies on *Heriot's Hospital* for the proposition that "charity property cannot be taken to indemnify a person injured by a breach of trust committed by the trustees of the charity".⁷⁵ And a leading text book on the law of charities cites *Heriot's Hospital* for the proposition that "a person injured by a breach of trust committed by the trustees of a charity cannot be indemnified out of the charity property."⁷⁶

Moreover, in a comparatively recent Chancery decision, *Liverpool and District Hospital for Diseases of the Heart v. Attorney General*,⁷⁷ Slade J. held that the claims of a creditor of an insolvent charity did not "comprise assets of which the company at the date of its liquidation was merely a trustee (in the strict sense) for ... charitable purposes, even though the legal title may have been vested in it".⁷⁸ This opinion goes to the core of the trust fund theory of charitable immunity since, if it were correct, it would mean that the tort liabilities of a corporate charity must not be satisfied from property the charity holds on trust for some aspect of its charitable objects – the same principle which animated *Duncan v. Findlater* and *Heriot's Hospital*. However, because Slade J.'s opinion was *obiter* (the case before him did not involve any express charitable trusts), and because he did not support his opinion with any authority, the opinion represents not a statement of law, but rather just a statement of the judicial mind-set on this issue.

B. Charitable Immunity Enters the United States and is Generally Rejected

There are literally hundreds of American cases that consider the doctrine of charitable immunity and many surveys adequately describe the doctrine in American law.⁷⁹ Consequently this paper will not re-till that ground. Nevertheless, it is important to understand that the doctrine of

⁷⁵ *Halsbury's Laws of England* 4th ed. (2001 reissue), vol. 5(2) (London: Butterworths, 2001) at para. 377. H. Picarda edited the chapter on Charities in this edition; the 1993 chapter edited by Professor Pettit contains the same statement. In 1938 Professor Goodhart pointed out that in relation to the liability of public hospitals, "the law is almost exactly the opposite to that stated in Halsbury" A.L. Goodhart, "Hospitals and Trained Nurses", *supra* note 8.

⁷⁶ Picarda, *The Law and Practice Relating to Charities*, *supra* note 6 at 496; although at 210 Picarda states that since *Mersey Docks v. Gibbs*, "charities are as vulnerable as other bodies to claims in tort" thereby implicitly accepting the logic of *Hillyer's* case, *supra* note 30.

⁷⁷ [1981] 1 Ch. 193.

⁷⁸ *Ibid.* at 205.

⁷⁹ For a survey of American immunity and non-immunity states see 15 *Am. Juris.* (2d) (1976) §§ 189-209; 25 A.L.R. (4th) 517 (1997); and W.F. Fratcher, ed., *Scott on Trusts*, 4th ed. (Boston: Little Brown and Company, 1987) Vol. IVA, §402.

charitable immunity entered the United States in the late nineteenth century when some state courts relied on the English cases apparently in ignorance of the fact they had been over-ruled.⁸⁰ Maryland, for example, adopted the principles found in *Heriot's Hospital*⁸¹ and Massachusetts adopted the principles found in *Holliday v. St. Leonard's, Shoreditch*.⁸² Over time, many American states developed a number of different justifications for the immunity of charitable property based on the over-ruled English decisions, such as the trust fund theory, limitations on vicarious liability, the doctrine of implied waiver, and ultimately, public policy itself, leading to different forms of immunity, from full to partial.

Nevertheless, many American state courts considered themselves free from authority on the point and proceeded to consider whether such immunity made any sense either doctrinally or in terms of policy. On the whole those courts that considered the matter from first principles held that such immunity was unsupportable as a matter of law or policy. One of the earliest statements in this regard, and one of the best statements from any source, was made by the Rhode Island Supreme Court:

The public is doubtless interested in the maintenance of a great public charity such as the Rhode Island Hospital is, but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any such person and any such corporation from liability from its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the Legislature.⁸³

The confused state of the doctrine of charitable immunity in American law in the first half of the twentieth century is revealed in the articles cited in note 7 above. As a result of this confusion, in 1942, the Federal Court of Appeals for the District of Columbia Circuit considered the entire body of American charitable immunity law in an effort to see if any coherence could be brought to it. The court concluded that the "great weight" of authority in the United States was against immunity and that there was no logically defensible principle unifying the different approaches to immunity amongst those states that had accepted the doctrine:

Paradoxes of principle, fictional assumptions of fact and consequence, and confused results characterize judicial disposition of these claims. From full immunity, through varied but inconsistent qualifications to general responsibility is the gamut of decision. The cases are almost riotous with dissent. Reasons are even more varied than results.

⁸⁰ Edith L. Fisch, Doris J. Freed and Esther R. Schachter, *Charities and Charitable Foundations* (Pomona, N.Y.: Lond Publications, 1974) at §621.

⁸¹ *Perry v. House of Refuge*, 52 Am. Rep. 495 (Md. 1885).

⁸² *McDonald v. Massachusetts General Hospital*, 21 Am. Rep. 529 (Mass. 1876).

⁸³ *Basabo v. The Salvation Army, Incorporated*, 85 A. 120 (R.I. 1912) at 124.

These are earmarks of law in flux. They indicate something wrong at the beginning or that something has become wrong since then. They also show that correction, though in process, is incomplete.⁸⁴

This decision is a powerful re-affirmation of the role and purpose of tort law in society. It begins with the general principle that "[f]or negligent or tortious conduct liability is the rule [and] immunity is the exception".⁸⁵ It makes the commonsensical but over-looked point that in terms of liability and responsibility, the law treats institutions the same as natural persons performing the same acts. And it rejects completely the notion that charity should exempt either natural persons or institutions from responsibility for harm:

It is a strange distinction, between a charitable institution and a charitable individual, relieving the one, holding the other, for like service and like lapse in like circumstances. The hospital may maim or kill the charity patient by negligence, yet the member of its medical staff, operating or attending without pay or thought of it, dare not lapse in a tired or hurried moment.

[...]

The basis of the distinction cannot be charity. It cannot be habit or continuity in charity. If it were either, individuals would be free upon proof of the fact, or institutions would be liable upon proof of the contrary in the particular instance. The distinction reverses the general trend of responsibility in a risk-sharing and distributing age.

[...]

If charity should exempt either institutions or individuals, it should be the latter. But there should be no distinction. Unless motive is to replace duty, both should be liable and liable alike. Institutions should shoulder the responsibilities all other citizens bear. They should minister as others do, with the obligation not to injure through carelessness.⁸⁶

Ultimately, the court concluded that the only basis for distinguishing between the liability of a charity and a non-charity was on the grounds of public policy and that no satisfactory policy argument presented itself for making such a distinction. Therefore, the court accepted that charitable institutions should not enjoy either asset immunity or enterprise immunity:

It is hardly necessary to discuss the various theories of exemption or their application in various modifications. Whether immunity be founded on the "trust fund" theory, the rule of respondeat superior, so called "public policy" or the more indefensible doctrine of "implied waiver", is not for us a controlling consideration. At bottom, except possibly for the last, these come down to the same thing supported by the same considerations. They are merely different names for the same idea, cast according to the predilection of the user for technical or for broader terminology. The "trust fund theory" comprehends

⁸⁴ *President and Directors of Georgetown College v. Hughes*, *supra* note 63 at 812 (per Rutledge J. [later an Associate Justice of the United States Supreme Court]).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 814-15.

all that is involved in "public policy", with only an apparent difference in approach. This is true likewise of "respondeat superior" and "implied waiver". In any event the result is a departure from general, and we think right, principles of liability. The differences in foundation do not affect even the extent of the departure.⁸⁷

In the United States, *Georgetown College* is accepted as the last word on the subject of charitable immunity.⁸⁸ Only a minority of American states now accepts charitable immunity, in whole or in part. Those states that once accepted charitable immunity are moving away from the doctrine, either by judicial rejection of the doctrine on the grounds that it was incorporated into state law by mistake,⁸⁹ or by legislation.⁹⁰

C. Charitable Immunity is Generally Rejected in Canada, Though not Without Debate

i) The Early Law

The first case in Canada (and probably the first reported case anywhere in the common law) to consider directly the effect of *Mersey Docks v.*

⁸⁷ *Ibid.* at 824-25.

⁸⁸ W.L. Prosser, *Handbook on the Law of Torts* 4th ed. (St. Paul: West, 1971) at 996; indeed, the academic literature on charitable immunity undergoes a remarkable change in approach after *Georgetown College*, *supra* note 63; the general support for immunity in the literature before 1942 is replaced with near universal condemnation of it after, see note 7, above.

⁸⁹ Eg. [listed chronologically following *Georgetown College*, *ibid.*]: *Foster v. Roman Catholic Diocese of Vermont*, 70 A. 2d 270 (Vt. 1950); *Malloy v. Fong*, 232 P. 2d 241 (Cal. 1951); *Moats v. Sisters of Charity of Providence*, 13 Alaska 546 (D. Alaska Terr. 3 Div. 1952); *Roman Catholic Church v. Keenan*, 243 P. 2d 455 (Ariz. 1952); *Wilson v. Lee Memorial Hospital*, 65 So. 2d 40 (Fla. 1953); *Wheeler v. Monadnock Community Hospital*, 171 A. 2d 23 (N.H. 1961); *Sheppard v. Emmanuel Baptist Church*, 353 S.W. 2d 212 (Ky. 1961); *McAtee v. St. Paul's Mission*, 376 P. 2d 823 (Kan. 1962); *Parker v. Port Huron Hospital*, 105 N.W. 2d 1 (Mich. 1962); *Wicklander v. Salem Memorial Hospital*, 385 P. 2d 617 (Or. 1963); *Widell v. Holy Trinity Catholic Church*, 121 N.W. 2d 249 (Wisc. 1963); *Flagiello v. Pennsylvania Hospital*, 208 A. 2d 193 (Pa. 1964); *Friend v. Cove Methodist Church, Inc.*, 396 P. 2d. 546 (Wash. 1964); *Granger v. Deaconess Hospital of Grand Forks*, 138 N.W. 2d. 443 (N.D. 1965); *Bell v. Presbytery of Boise*, 421 P. 2d 745 (Idaho 1966); *Myers v. Drozda*, 141 N.W. 2d. 852 (Neb. 1966); *Rabon v. Rowan Memorial Hospital Inc.*, 152 S.E. 2d 485 (N.C. 1967); *Sullivan v. First Presbyterian Church*, 152 N.W. 2d 628 (Iowa 1967); *Harris v. YWCA*, 237 N.E. 2d 242 (Ind. 1968); *Garnier v. St. Andrew Presbyterian Church of St. Louis*, 446 S.W. 2d 607 (Mo. 1969); *Howle v. Camp Amon Carter*, 470 S.W. 2d 629 (Tex. 1971); *Rakaric v. Croatian Cultural Club*, 76 A.D. 2d 619, (N.Y.A.D. 1980); *Albritton v. Neighborhood Centers Association for Child Development*, 466 N.E. 2d. 867 (Ohio 1984); *Hasell v. Medical Society of South Carolina*, 342 S.E. 2d. 594 (S.C. 1986); *Davis v. The Church of Jesus Christ of Latter Day Saints*, 852 P. 2d 640 (Mont. 1993); *Whetstone v. Dixon*, 616 So. 2d 764 (La. 1993); *Scott on Trusts* 4th, *supra* note 79.

⁹⁰ Eg. *Conn. Gen. Stat. Ann.* §52-557d; *N.C. Gen. Stat.* §1-539.9; *Nev. Rev. Stat.* §41.480.

Gibbs on Heriot's Hospital was the New Brunswick Court of Appeal in *Donaldson v. The Commissioners of the General Public Hospital in Saint John*.⁹¹

Doctors at a public hospital, the assets of which were held in trust by the defendant commissioners, negligently injured Donaldson. The commissioners defended the action on the ground that in law they were not liable, being public trustees. The court reviewed *Duncan v. Findlater*, *Heriot's Hospital*, *Mersey Docks v. Gibbs* and *Coe v. Wise* and in a 2-1 decision held that public trustees acting gratuitously can be sued and that the plaintiff's damages could be paid from the property in held trust.

In his majority judgement, Fraser J. accepted that since the time of *Mersey Docks v. Gibbs*, an action in tort has lain against a corporation or public trustee when they act gratuitously for public purposes. Importantly, he said "they are not exempted by the Legislature from this liability, because the legislative provisions which regulate them...specially apply their funds to purposes not including the payment of such damages...".⁹² In a concurring judgement, Palmer J. used concepts that were to be echoed a hundred years later by the Supreme Court of Canada:⁹³

[A]nd no doubt it does appear to be a hard thing that persons or corporations who take upon themselves to do acts of charity or other public acts gratuitously, should be called upon to pay for the negligence of their servants; but, on the other hand, it is equally hard, that a person who has been injured by no fault of his own, but by the negligence of another, should suffer, and the person guilty of such negligence should escape; and when it comes to be a question whether one of two comparatively innocent persons should suffer, that is the master whose servant has done the wrong, and the person who has suffered the wrong, I think sound public policy has declared that it would be safer in such a case to make the master liable, as he, by selecting the particular servant, has enabled him to do the wrong, and the law gave him the fullest latitude to select whom he pleased and on what conditions he pleased.⁹⁴

In contrast to the majority judgements, Tuck J., in dissent, held that *Mersey Docks v. Gibbs* had not over-ruled *Heriot's Hospital* which still represented good law and sound policy. His Lordship adopted Lord Cottenham's reasoning from *Heriot's Hospital*, accepting that a plaintiff cannot maintain an action against the managers of property held in trust for charitable purposes:

Mersey Docks Trustees v. Gibbs is entirely different from this case [Donaldson], and does

⁹¹ (1890), 30 N.B.R. 279 (N.B.C.A.).

⁹² *Ibid.* at 298.

⁹³ *Bazley v. Curry*, *supra* note 2.

⁹⁴ *Donaldson v. The Commissioners of the General Public Hospital in Saint John*, *supra* note 91 at 301-302 (*per* Palmer J.).

not dissent from, or pretend to lay down law, at variance with what is found in *Feoffees of Heriot's Hospital v. Ross*.⁹⁵

[...]

In my opinion, if the plaintiff has been damnified, he is seeking to be indemnified out of the trust funds of a corporate body which exists solely for charitable purposes, and if that is so, this action should not be allowed to proceed further.⁹⁶

Accordingly, all the strands of the charitable immunity doctrine are represented in the judgments in this case. Fraser J. held that equity confers no immunity on property held in trust for charitable purposes and thus the matter is to be determined by ordinary principles of tort law. Palmer J. held that charitable immunity is a matter for public policy and that policy rejects granting immunity to charity. And in dissent, Tuck J. argued that property held in trust for the public benefit was immune from actions in tort on the ground that trust law compels this result. To put this slightly differently, and in modern language, Fraser J. held that charitable property did not enjoy any asset immunity and therefore the charity could not enjoy enterprise immunity. Palmer J. held that charities did not enjoy enterprise immunity and therefore their assets did not enjoy immunity either. And in dissent, Tuck J. argued that charitable property enjoyed asset immunity and therefore the charity should enjoy enterprise immunity.

In 1915, the Appellate Division for the Province of Ontario, in another hospital negligence case, accepted that in *Mersey Docks v. Gibbs* the trust fund theory of charitable immunity "received its quietus" and "has now no footing in our law".⁹⁷ And in 1927, the Supreme Court of Canada held that "in view of the decision of the House of Lords [in *Mersey Docks v. Gibbs*]",⁹⁸ the contention that a body carrying on work for the benefit of the public is free of liability is "hopeless".⁹⁹ These principles were confirmed in a 1994 case against a hospital for permitting transfusions of blood tainted with a deadly virus.¹⁰⁰

In 1997 a church in Ontario was charged and convicted of a criminal offence and fined \$250,000.¹⁰¹ The church, although not supporting its position with any case law, argued that it should not be fined because its

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at 285 (per Tuck J.). Indeed, Tuck J. went so far as to describe Lord Westbury's speech in *Mersey Docks v. Gibbs* as a "sneer" at Lord Cottenham, *ibid.* at 287.

⁹⁷ *Lavere v. Smith's Falls Public Hospital* (1915), 26 D.L.R. 346 (Ont. C.A.) at 109, 114 (per Riddell J.A.) and 126 (per Kelly J.A.).

⁹⁸ *Nyberg v. Provost Municipal Hospital Board*, [1927] S.C.R. 226 (per Anglin C.J.C., Duff, Newcombe and Rinfret, JJ.) at 235-36 (per Mignault J. dissenting on other grounds) rejecting *Hillyer v. Governors of St. Bartholomew's Hospital*, *supra* note 31.

⁹⁹ The New Zealand Court of Appeal in *Logan v. Waitaki Hospital Board*, [1935] N.Z.L.R. 385 (C.A.) accepted that the Canadian cases accurately stated the law.

¹⁰⁰ *Pittman Estate v. Bain* (1994), 112 D.L.R. (4th) 257 (Ont. Gen. Div.) at 351 [supp. reasons 112 D.L.R. (4th) 482].

¹⁰¹ *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.), leave to appeal to

property was held in trust for its parishioners and they would thus be required to pay the fine though innocent of wrongdoing. The Ontario Court of Appeal dismissed the argument. The court held that the fact that the payment of a fine diverts funds from religious purposes or prejudices innocent parishioners is not a justification for treating the church any differently than a for-profit corporation.¹⁰² Therefore, the religious corporation could not use its status as a charity to avoid paying its liabilities. In reaching its decision, the court did not consider the charitable immunity case law, but simply accepted that it is fundamental to a democratic society that no person should be above or beyond the law, and that the promotion of religious beliefs or like purposes cannot justify the violation of or protect against the violation of society's laws.¹⁰³ The court's language on this point was remarkably close to the language of the Rhode Island Supreme Court in *Basabo v. The Salvation Army, Incorporated*. In other words, the Court of Appeal accepted that arguments for and against immunity were purely arguments of public policy and that it would be contrary to policy to protect the charity for the benefit of its members at the expense of society's right to receive payment of the fine.

ii) *Bazley v. Curry* and *Jacobi v. Griffiths*

In 1999, the Supreme Court of Canada was faced with two cases concerning the vicarious liability of non-profit organisations arising out of the sexual misconduct of the respective organisations' employees. In the first of these cases, *Bazley v. Curry*,¹⁰⁴ the court unanimously imposed vicarious liability on the organisation for reasons squarely derived from public policy; in the second of these cases, *Jacobi v. Griffiths*,¹⁰⁵ in a 4-3 decision the court rejected vicarious liability for the organisation, seemingly based on the defendant's status as an altruistic enterprise.

In *Bazley v. Curry* the court articulated a two-step process for imposing vicarious liability. A trier of fact must first decide if precedents "unambiguously" determine that vicarious liability is to be imposed for a particular wrong. If the prior cases do not provide clear guidance on the point, the trier of fact must then decide whether vicarious liability should be imposed "in light of the broader policy rationales behind strict liability".¹⁰⁶ In relation to the second step, the court held that vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the accruing wrong – even if the wrong is contrary to any act the employer would have

S.C.C. refused (1998), 227 N.R. 291n.

¹⁰² *Ibid.* at 127, 130-132, 136, 137-138.

¹⁰³ *Ibid.* at 138.

¹⁰⁴ *Bazley v. Curry*, *supra* note 2 (McLachlin J. as she then was, for the Court).

¹⁰⁵ *Jacobi v. Griffiths*, *supra* note 2 at paras. 29-87 (*per* Binnie J. for the majority).

¹⁰⁶ *Bazley v. Curry*, *supra* note 2 at para. 15.

authorised to do. The court also identified a number of factors that are to be used for determining the sufficiency of the connection between the employer's creation or enhancement of the risk of the wrong complained of. The court held that these factors had to be applied with a view to the policy considerations that underlie the imposition of vicarious liability—the fair and efficient compensation for harm and deterrence.¹⁰⁷

For the purposes of the law of charitable immunity this case is important because of the policy argument advanced by the defendant non-profit organisation and the parties, mainly churches, which intervened on the appeal. They argued that even if liability for an organisation with altruistic objects could be supported under normal principles of law, such organisations should nevertheless be immune from liability as a matter of public policy because they cannot pass their liability on to the people who benefit from their activities. Consequently, should the organisation's liabilities overwhelm it, thereby causing it to fail, all the people who rely on its services and yet are innocent of wrongdoing would be harmed. In response to this argument the Supreme Court of Canada unanimously held as follows:

I cannot accept this contention. It is based on the idea that children like the respondent must bear the cost of the harm that has been done to them so that others in society may benefit from the good work of non-profit organizations. The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism. Indeed, it is far from clear to me that the "net" good produced by non-profit institutions justifies the price placed on the individual victim, nor that this is a fair way for society to order its resources. If, in the final analysis, the choice is between which of two faultless parties should bear the loss—the party that created the risk that materialized in the wrongdoing or the victim of the wrongdoing—I do not hesitate in my answer. Neither alternative is attractive. But given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it.¹⁰⁸

Although it does not appear that counsel referred the Supreme Court of Canada to any of the charitable immunity case law, McLachlin J.'s language in *Bazley v. Curry* is remarkably similar to Palmer J.'s in *Donaldson v. The Commissioners of the General Public Hospital in Saint John*.¹⁰⁹ Moreover, the sentiments expressed by both McLachlin J. and Palmer J. flow naturally from Lord Westbury's speech in *Mersey Docks v. Gibbs*, where he said that "trust or corporate property should be amenable to the persons injured for then there is no failure of justice" and that the opposite conclusion "if recognised as the law [would] undoubtedly lead to a very great evil and injury".¹¹⁰

¹⁰⁷ *Ibid.* at para. 46.

¹⁰⁸ *Ibid.* at para. 54.

¹⁰⁹ *Supra* note 91 at 301-302 (*per* Palmer J.).

¹¹⁰ *Mersey Docks v. Gibbs*, *supra* note 43 at 4121-413D (*per* Lord Westbury).

Bazley v. Curry was released as a companion decision to *Jacobi v. Griffiths*, and thus has to be read with it. In *Jacobi v. Griffiths* the court applied the two stage process articulated in *Bazley v. Curry* to the facts of *Jacobi*. With respect to the first step, the court held that precedent did not clearly justify imposing vicarious liability on the defendant organisation in *Jacobi*. Therefore, the court turned to the second step and examined whether policy favoured the imposition of vicarious liability based on considerations of compensation and deterrence. It is the court's articulation of those considerations in the context of an enterprise with altruistic objects that is important for the purposes of the doctrine of charitable immunity.

Writing for the majority, Binnie J. began his analysis with the assertion that "imposition of no-fault liability does not necessarily achieve a comparable result when applied to non-profit organizations as it does when applied to commercial organizations."¹¹¹ From this assertion Binnie J. concluded, in effect, that to the extent altruistic organisations cannot provide effective compensation or be effectively deterred, they should be held to a lower standard of liability. In terms of compensation, he observed that such organisations have no mechanism to "internalize" the costs of their liability because they cannot pass such costs on to their customers the way businesses can.¹¹² In terms of deterrence he held that such organisations might be deterred from providing any public service by the prospects of unforeseen vicarious liability.¹¹³ For these reasons, Binnie J. held that a "strong" connection has to be established between the enterprise risk and the wrongdoing before vicarious liability can be imposed on an organisation with altruistic objects.¹¹⁴

Binnie J.'s analysis in *Jacobi v. Griffiths* slides dangerously close to charitable immunity. But does it slide over the line into immunity? The answer is "no", or at least "not directly". First of all, in his analysis, Binnie J. clearly said that the court was *not* exempting non-profit or charitable organisations from vicarious liability. In relation to the compensation function, he said that the fact that non-profit employers cannot internalise the costs of their liability is not a justification to permit those employers to "escape vicarious liability on that account".¹¹⁵ And in relation to the deterrence function, he said that "I agree entirely...that '[t]he suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism'."¹¹⁶ Binnie J. pointed out that the court was concerned with providing an "effective" remedy rather than unnecessarily sacrificing the "greater good" for no personal gain by the victim. Therefore, *Jacobi v. Griffiths* is compatible with the court's

¹¹¹ *Jacobi v. Griffiths*, *supra* note 2 at para. 68 (per Binnie J.).

¹¹² *Ibid.* at para. 71.

¹¹³ *Ibid.* at para. 75.

¹¹⁴ *Ibid.* at para. 78.

¹¹⁵ *Ibid.* at para. 71.

¹¹⁶ *Ibid.* at para. 76.

rejection of charitable immunity in *Bazley v. Curry* if it (the former decision) is understood to mean that when the victim is to be compensated by searching for a "deep pocket", the court should be satisfied that the pocket really is deep before imposing liability on an altruistic organisation.

The trouble with this reading of *Jacobi v. Griffiths* is two-fold, however. First of all, this reading presupposes that in *Bazley v. Curry* the Supreme Court of Canada was really advocating an *unprincipled* analysis of vicarious liability based on finding the deepest pocket with a connection to the harm in order to satisfy the liability. Secondly, this reading accepts that the standard for imposing vicarious liability on a non-profit organisation, such as a charity, is higher (a "strong connection") than that used to impose liability on a profit-making enterprise.

Both of these criticisms were advanced in the dissenting judgement, written by McLachlin J. She accepted that implicit in the majority's decision was the proposition that the goal of vicarious liability is simply finding the best deep pocket in order to finance compensation for a loss, a proposition she said was expressly rejected in *Bazley v. Curry*:

The goal of compensation is not simply a deep pockets rule. Fair compensation involves internalizing the cost of a risk on the appropriate party, judged not by terms of ability to pay but by introduction of the risk that led to the tort.¹¹⁷

Secondly, Justice McLachlin accepted that the majority's decision indirectly created special rules for imposing vicarious liability on organisations with altruistic motives or aims:

Second, for the reasons set out in [Bazley] I cannot agree that the goals of compensation and deterrence are not served... notwithstanding the non-profit character of the Club. I note that the old common law charitable immunity rule has long been abolished. The animation of such a rule was that many charities, performing needed and valuable services to the public, might have had to cease operations had they been inundated with tort claims (either fault-based or non-fault based claims). The rule having been rejected, the logic on which it was based – that charities should be exempted from tort claims lest they be forced to cease good works – should also be rejected, absent legislative countermand.¹¹⁸

Madam Justice McLachlin's criticisms mirror Justice Rutledge's conclusions in *Georgetown College* that there is no principled basis upon which to distinguish the liability of an altruistic enterprise from that of a profit-making one or an individual person. Applying a different standard for the imposition of vicarious liability on an altruistic enterprise than that imposed on a commercial one is to replace duty with motive. Nevertheless,

¹¹⁷ *Ibid.* at para. 24 (per McLachlin J.).

¹¹⁸ *Ibid.* at para. 25.

in *Bazley v. Curry* the Supreme Court unanimously rejected the idea that altruistic bodies should be protected from tort liability because it was in the public interest to do so. Moreover, these same judges re-confirmed this position in *Jacobi v. Griffiths*. Therefore, *Jacobi v. Griffiths* should not be read as accepting the principle that altruistic enterprises are protected from vicarious liability in circumstances where a commercial body would be found liable merely because it appears to be in the public interest to do so in one case but not the other. Such an interpretation of *Jacobi v. Griffiths* would nullify *Bazley v. Curry* and be contrary to the weight of authority in the common law world on the point. Instead, *Jacobi* should be understood as applying only to the question of whether facts like those present in that case are sufficient to permit vicarious liability to be imposed as a matter of the general application of tort principles.

iii) *Post Bazley and Jacobi*

The most extensive modern analysis of the charitable immunity doctrine in the Commonwealth arose out of the pan-Canadian proceedings relating to the winding-up and liquidation of The Christian Brothers of Ireland in Canada. The court supervising this liquidation, the Ontario Superior Court of Justice, had to consider whether charitable immunity applied either to the liability of the Christian Brothers' organisation or to some or all of its assets.¹¹⁹ Following a lengthy Chambers application, Blair J. held that charitable immunity did not apply to the organisation or to most of its assets, but did apply to those assets owned by the charity pursuant to an *express* trust for charitable purposes. His Honour's decision was rendered before the Supreme Court of Canada decided *Bazley v. Curry* and *Jacobi v. Griffiths*. His decision was appealed and partially reversed after the Supreme Court's decisions.¹²⁰

Blair J. had no difficulty in concluding that altruistic enterprises were not immune from direct or vicarious liability merely because their purposes were altruistic. On this point he held:

Although the doctrine of charitable immunity enjoyed a short-lived recognition in England for a period of time in the mid-nineteenth century, and is still accepted in a few of the states in the United States of America, it has never gained a foothold in this country.¹²¹

However, he went on to hold that any assets a charitable enterprise owns in trust for charitable purposes are presumptively immune from its direct or

¹¹⁹ *Re Christian Brothers of Ireland in Canada*, *supra* note 3 (Gen. Div.) *per* R.A. Blair J.

¹²⁰ *Re Christian Brothers of Ireland in Canada*, *supra* note 3 (Ont. C.A.) *per* Feldman J.A., Abella J.A. (Doherty J.A. concurring).

¹²¹ *Supra* note 3 (Gen. Div.) at 386.

indirect tortious liability. Blair J. held that such assets could be used to pay for the enterprise's tort liabilities only if the wrong arose out of the charitable purpose for which the assets are held in trust:

[e]xigibility of such property [held on a specific charitable purpose trust] depends on whether the wrong has been perpetrated within the framework of the particular charitable purpose in question, as I have earlier delineated it. I do not think that tort claims legitimately asserted against one specific charitable purpose property can be asserted against other specific charitable purpose property that may be held by the same charitable corporation".¹²²

Blair J. explained that only those assets held in trust for charity which are connected¹²³ (presumably in some physical way) to the tort should be available to pay for the damages caused by the tort. His Honour reasoned that the "equities" require that this be so:

The "equities" to which trust property held by a charitable corporation by way of a *specific charitable purpose trust* are subject include, in my opinion, the requirement that such property respond to legitimate tort claims incurred with respect to the furtherance of the charitable purpose.¹²⁴

Although at first blush Blair J. appears to have *rejected* charitable immunity,¹²⁵ on closer analysis it is apparent that Blair J. implicitly *adopted* charitable immunity on essentially the same basis as Lord Cottenham did in *Heriot's Hospital*. Lord Cottenham held that a charitable trust is to be managed for the benefit of those who are the objects of the charity, and thus it would be a misapplication of the property held in trust to pay damages to those who could not be regarded as falling within the class of those who were to benefit from the charitable activity. Blair J. held that as a matter of trust law ("the equities") the objects of every charitable trust embrace the payment of tort liability incurred by the charity to members of the class of those who are to benefit from the trust property. Therefore, Blair J. concluded, property held on a charitable trust may be used to pay damages to those whose injuries have a sufficient "connection" to the purposes for which the property in trust is held, but not to pay for tort liability owed to others.¹²⁶

¹²² *Ibid.* at 400g.

¹²³ "I accept the submission by counsel for the two schools and by representative counsel for the charitable objects that the only "charitable purpose trust" assets potentially available to satisfy tort claims against the corporation are those with which the wrongs committed have some connection", *ibid.* at 401h.

¹²⁴ *Ibid.* at 399h.

¹²⁵ E.g. *ibid.* at 397f-g.

¹²⁶ Cf. *ibid.* at 399d-e.

Consequently, Blair J.'s judgment introduced charitable immunity into the law by the back door by reviving on an asset-specific basis the presumption that equity protects property held on a charitable trust from liability. The "connection" requirement was simply a partial exception to the general principle implicit in Blair J.'s judgment that a charitable trust confers asset immunity. Moreover, the analysis underlying the judgment was an inversion of the "beneficiary" theory of charitable immunity found in some of the American immunity case law.¹²⁷ This theory holds that a "beneficiary" of a charity cannot claim tort damages from the charity but that a "stranger" can. Blair J. held that the "beneficiary" can but that a "stranger" cannot. Syllogistically, it is the same analysis. The court is defining the class of tort victims who have a right to have their judgment paid from the charitable assets by reference to the "purposes" for which the assets are held, rather than by reference to ordinary principles of tort liability.

One of the practical consequences of this judgment, then, was to make it possible for charitable organisations to render their property immune from tortious liability. Charities would merely have to organise their activities through charitable trusts that define the trust purpose in such a way that the purpose could not be "connected" to any tortious wrongdoing, or at least not connected in any physical way. Charitable trusts would thus become little more than creditor-proofing devices. Indeed, the sole reason advanced by many commentators for supporting Blair J.'s judgment is that it allows a charity or its donors to creditor-proof the charity's assets.¹²⁸

Since Blair J. expressly rejected charitable immunity at the level of the enterprise but implicitly adopted it at the asset level, the decision illustrates the hold charitable immunity has on the legally-trained mind and the difficulty of reasoning through trust-based theories of immunity. Blair J. considered *Heriot's Hospital*, accepted that it and its principles had been "thoroughly rejected" by the House of Lords in *Mersey Docks v. Gibbs*,¹²⁹ recognised that the doctrine had never found a home in Canada, advanced persuasive policy reasons for why charitable immunity has been rejected, crafted a theory of how a tort creditor could obtain direct recovery from charitable trust assets, and in doing so indirectly introduced charitable immunity into Canadian law.

In a unanimous judgment, the Court of Appeal for Ontario set aside that part of Blair J.'s judgment dealing with the exigibility of property held on trust for specific charitable purposes.¹³⁰ In a concurring judgement, Doherty J.A. held that when a charitable corporation is being wound-up, all

¹²⁷ Explained in *Georgetown College*, *supra* note 63; cf. *Autry v. Roebuck Park Baptist Church*, 229 So.2d 469 (Alab. 1969).

¹²⁸ E.g. the articles by Davis and Carter *supra* note 8.

¹²⁹ *Supra* note 43 at 387f.

¹³⁰ The Court of Appeal's decision is the subject of a note "The Non-Immunity of Charitable Trust Property" (2003) 119 L.Q.R. 49, by the same author.

of its property, whether held beneficially or on trust for charitable purposes, is available for the payment of its debts, on the basis that a charitable corporation in liquidation should be treated as one entity "and not as a number of separate pieces each with its own set of obligations and assets".¹³¹ Doherty J.A. rejected the idea that any asset of an insolvent charity has a "purpose" beyond the payment of the charity's debts. Accordingly, His Lordship did not have to consider the effect, if any, of trust law on the issue of the exigibility of charitable assets to pay tort claims when the corporate trustee was *not* being wound-up.

The judgment of the majority, however, faced the charitable immunity issues raised in Blair J.'s judgment head-on. First of all, the majority agreed with Blair J.'s conclusion that the doctrine of charitable immunity had never been accepted in Canada but instead was "expressly rejected".¹³² Then, writing for the majority, Feldman J.A. held that Blair J. had made the same mistake Lord Cottenham made 140 years ago: assuming that trust law determines when a charity's assets can be used to pay its tort liabilities. As Feldman J.A. put it:

With respect to Blair J., in my view he erred by proceeding to answer the second question, whether the assets of a charity are exigible to satisfy tort claims, by analyzing that issue separately, embarking on a trust analysis of the way charities hold their assets. In my view, by so doing he simply re-addressed the same immunity issue by asking the question in a different manner.¹³³

She held that the only legally relevant consideration is whether a charitable enterprise is liable based on ordinary tort principles. If it is, then all the property it owns and uses as part of its charitable activities is available to pay this liability. Considerations of how the charity came to own its property and whether its use of this property was restricted in some way, such as by a charitable trust, are therefore irrelevant:

Once he [Blair J.] had determined that there was no doctrine of charitable immunity in Canada, it became redundant to then analyze whether the assets are held on trust in order to determine if they are exigible to pay the claims of tort victims... Because a charity is not immune from liability... the assets of the charity, be they beneficially owned or be they "trust funds", are available to respond to those liabilities.... It is neither necessary nor logically probative, to examine each asset of the charity on an individual basis to determine its availability to be answerable for the debts of the charity...based on whether that asset is held in trust for one or more charitable purposes. *To do so is to re-introduce into our law the rejected doctrine of charitable immunity by resurrecting the equally rejected trust fund theory.*¹³⁴

¹³¹ *Supra* note 3 (C.A.) at 712 (*per* Doherty J.A.).

¹³² *Ibid.* at 683.

¹³³ *Ibid.* at 693c-f (*per* Feldman J.A.).

¹³⁴ *Ibid.* at 685g-686a (emphasis added).

Once the court accepted that the law's rejection of charitable immunity was a rejection of *both* asset immunity *and* enterprise immunity, it was not necessary to go further. But since the idea that trust law protects assets held on trust for charity from the charity's liabilities is so seductive to the legal profession, the court spent a considerable amount of time explaining why trust-based theories of charitable immunity have no place in modern law.¹³⁵

The court explained that such theories rely on one or a combination of three supporting rationales: donor intent, the alleged difference between the trustee's legal and beneficial interest in trust assets, and the prohibition against a trustee's obtaining reimbursement from trust funds if the trustee has been guilty of wrongdoing.¹³⁶ The court concluded that "each of these rationales for the trust theory was either expressly or impliedly rejected with the rejection of charitable immunity" in *Mersey Docks v. Gibbs*.¹³⁷

The Court of Appeal concluded that charitable immunity was rejected essentially because it was incompatible with public policy. Referring to the House of Lords, the Federal Court of Appeals for the District of Columbia, and the Supreme Court of Canada (amongst other courts),¹³⁸ the Court of Appeal held that the policy choice is either to preserve charitable property for the benefit of the public or to use it to pay the charity's liabilities to individual members of the public. The Court of Appeal held that the Law Lords and those courts that followed *Mersey Docks v. Gibbs* held as sound policy that the public who were intended to benefit from the operation of a charity would have to lose when judgments were executed against the property of the charity.¹³⁹ Therefore, the Court of Appeal concluded, whether the charity holds its property beneficially or in trust for charitable objects, or whether the charity is organised through a corporation or a board of trustees, it and its assets are as answerable for tortious wrongdoing as a private person holding assets for his or her own purposes would be.¹⁴⁰

This point needs to be emphasized. Those cases that considered the charitable immunity doctrine immediately following *Mersey Docks v. Gibbs*, such as *Foreman v. Mayor of Canterbury*¹⁴¹ or *Gilbert v. Corporation of Trinity House*,¹⁴² understood that when charitable

¹³⁵ Representative Counsel appointed by the Ontario Superior Court to make submissions on behalf of the Christian Brothers' tort victims, Douglas G. Garbig, argued in the Court of Appeal that the charitable trust immunity issue is in reality an issue for the law of debtor and creditor, not trusts. To the author's knowledge Mr. Garbig first articulated this insight.

¹³⁶ These theories are fully canvassed in "The Attachment of Charitable Property at Law and in Equity", *supra* note 23.

¹³⁷ *Supra* note 3 (C.A.) at 694g.

¹³⁸ *Ibid.* at 688-89, 690-91, 706-707, respectively.

¹³⁹ *Ibid.* at 701g.

¹⁴⁰ *Ibid.* at 709c.

¹⁴¹ *Supra* note 60.

¹⁴² *Supra* note 64.

immunity was rejected this meant that, when dealing with tortious liability, altruistic bodies were to be treated like private persons. Since private persons cannot claim to be immune from tort liability on the grounds that they hold their property for private purposes, altruistic bodies cannot claim to be immune from tort liability on the grounds that they hold their property for public purposes. The fact that the altruistic body holds property in trust for its public purposes does not thereby make its property immune since all its property *must* be held for the public purposes defined by its organising constitution.¹⁴³ To make an altruistic body's property immune on the basis that the body holds its property in trust for the public purposes the body was established to advance would be like making the property of a private person immune on the basis that the person holds his property in trust for the private purposes he pursues – a self-evident absurdity.

Thinking that an altruistic body's purposes can restrict access to its property by those whom it injures rapidly leads to the view that those purposes can be sub-divided, with each division subject to its own liabilities and creditors. The Court of Appeal illustrated why this is so by using the example of the Christian Brothers' organisation. The Christian Brothers' organisation was dedicated to the charitable purpose of religious education, including the charitable purpose of owning and operating schools. Accordingly, all their property and all their activities were required to be devoted to some aspect of public purpose, such as owning schools in particular locations, teaching, or providing teaching materials and the like. Once it is accepted that the purpose of religious education itself does not immunise the Christian Brothers' organisation or its property from tortious liability, what principled basis would there be for dividing up that purpose into sub-categories of religious education in order to immunise the assets devoted to those purposes from the Christian Brothers' liabilities? The Court of Appeal held that there was no such basis for doing so:

The result reached below does not address how to determine what is to be considered as the specific charitable purpose when deciding whether the tort was committed within the framework of the purpose. Is it the charitable purpose itself, for example, providing education, or is it a particular project at a particular location, such as an entire school, or can it be a portion of a specific project, such as one room within the school? By defining 'specific charitable purpose' in terms of any specific use of funds designated by a donor, the tort claimants seeking to maximize their recovery will always be pitted against the interests of those who wish to preserve as many of the assets of the charity intact as possible, who will argue the narrowest scope for the definition of the charitable purpose within which the wrong was perpetrated. As suggested by the music room and hospital wing examples, if different rooms within an educational institution or hospital are endowed on trust for the purpose of the room or wing, one could argue that because the

¹⁴³ By its charter or articles of incorporation in the case of a corporation, or by the terms of a trust deed in the case of a board of trustees.

wrong was not committed in that room or wing, therefore that asset is not exigible and should be preserved.¹⁴⁴

Accordingly, schools that the Christian Brothers owned in trust for education in one part of Canada could be used to pay liabilities the charitable organisation incurred from educating people in a different part of the country.

Charitable immunity was also raised, though in a completely different guise, in the British Columbia Court of Appeal, in the related proceedings over the ownership of two schools owned by the Christian Brothers' order.¹⁴⁵ The Court of Appeal for British Columbia was asked to decide: (i) that enterprise immunity applies to unincorporated associations with charitable objects on the basis that the "enterprise", being only an association of persons, cannot be sued; and (ii) that asset immunity applies to the assets used by such associations on the basis that the assets can be held only by members of the association as trustees for charitable purposes and not for their private gain. The appellants argued that, since only individual members of the association could be found liable in tort, only those directly responsible for wrongdoing should be held accountable, and since no individual member had any private right to the assets held in trust, these assets could not be used for any such liability. In other words, the immunity argument made in the Court of Appeal for British Columbia was that charities organised as unincorporated associations can neither incur tort liabilities nor own assets that can be seized to pay tort liabilities, thereby making them entirely immune from such liability.

In a 2-1 decision the British Columbia Court of Appeal rejected these arguments.¹⁴⁶ For the majority, Hollinrake J.A. concluded that it was artificial to say that an unincorporated association, whether its objects are charitable or not, has no legal interest in the property used by the association in its charitable activities that can be seized by creditors.¹⁴⁷ Instead, the charitable enterprise has a legal interest, through its members, which can be seized by creditors.¹⁴⁸ His Lordship explained that the reason why equity permits unincorporated charitable associations to hold property on charitable trusts is to save charitable gifts made to unincorporated associations that would otherwise fail (because the association's members are precluded from taking any personal benefit in the property of the association).¹⁴⁹ These rules were not developed by the legal system,

¹⁴⁴ *Supra* note 3 (C.A.) at 700-701.

¹⁴⁵ *Rowland v. Vancouver College Ltd.*, *supra* note 4.

¹⁴⁶ *Ibid.* (per Hollinrake J.A. (Rowles J.A. concurring Braidwood J.A. dissenting)).

¹⁴⁷ *Ibid.* at 219-20.

¹⁴⁸ In this respect, Hollinrake J.A.'s analysis of the legal status of charitable associations foreshadowed the Supreme Court of Canada's analysis of the legal status of trade unions, cf. *Berry v. Pulley* (2002), 211 D.L.R. (4th) 651 (S.C.C.).

¹⁴⁹ *Supra* note 4 at 218.

Hollinrake J.A. explained, in order to create a fire-wall between the liabilities of an altruistic organisation and the assets it holds for its good works. For this reason, the Court of Appeal held, the liabilities incurred by the association or its members as part of its altruistic enterprise can be satisfied from the property the enterprise holds through its members, albeit in trust for charitable purposes.¹⁵⁰

Therefore, by its decision the British Columbia Court of Appeal, too, refused to introduce the trust fund theory of charitable immunity into the law of British Columbia, in this case through the means by which unincorporated charitable associations receive gifts and hold property. In this regard the decision follows American law which holds that the liability of a charitable organisation (and the attachment of its assets) must be the same whether it is an unincorporated association or a corporation with charitable objects:

It seems clear that the same principles of policy are applicable to charitable trusts as are applicable to charitable corporations, although the technique involved may be somewhat different. In the case of charitable trusts the situation is more nearly analogous to that of charitable corporations than it is to that of private trusts.¹⁵¹

The only court in the Commonwealth since *Heriot's Hospital* in 1846 expressly to hold that a charity or non-profit body is immune from vicarious liability is the Newfoundland and Labrador Court of Appeal in *John Doe v. Bennett*.¹⁵² This case concerned the direct and vicarious liability of a Roman Catholic Archdiocese for child abuse committed by a priest. The Court of Appeal unanimously upheld the *direct* liability of the Diocese, but by a 2-1 decision rejected vicarious liability. The majority did so by holding that in Newfoundland and Labrador, charities and other non-profit organisations engaged in altruistic conduct, such as churches, are fully immune from vicarious liability. Since the court upheld the claims of direct liability, the decision in relation to vicarious liability is technically *obiter*. However, in light of the majority's sweeping grant of immunity for such organisations, the reasoning bears scrutiny.

Firstly, the court held that the policy of the law is to immunise altruistic organisations from vicarious liability unless good reasons can be found for

¹⁵⁰ In dissent, Braidwood J.A. held that an unincorporated charitable association cannot hold legal title or act as a trustee and thus any property it holds on a charitable trust (which necessarily must be all the property it uses in its charitable activities) must be immune since the association would neither have debts nor property in which to satisfy them. In *obiter* (the issue was not before the British Columbia Court of Appeal) His Lordship also opined that he preferred the position of Blair J. to that of the Court of Appeal for Ontario on charitable immunity, *ibid.* at 224-53.

¹⁵¹ *Scott on Trusts*, *supra* note 79 at §402.2, Vol. IVA, at 660.

¹⁵² *John Doe v. Bennett*, *supra* note 5, per Marshall J.A. (Steele J.A. concurring, Cameron J.A. dissenting).

extending such liability to these organisations.¹⁵³ In other words, the court held, that for altruistic organisations, immunity is the rule and liability is the exception. Secondly, the court held that altruistic organisations, especially churches, confer a social benefit that should be fostered.¹⁵⁴ And thirdly, the court held that if altruistic organisations are found vicariously liable their members and supporters might refuse to serve the organisation because of a "cloud of opprobrium".¹⁵⁵ In support of its decision, the majority looked to *Jacobi v. Griffiths* but not to *Bazley v. Curry*.¹⁵⁶

Each element of the majority's decision is based on reasoning that has been decisively rejected throughout the common law world. No Canadian court has ever before held that immunity is the rule and vicarious liability the exception when the defendant engages in altruistic activities. Indeed, every Canadian court to consider the issue has decided to the contrary, as have the leading decisions of other common law jurisdictions. Secondly, those courts that have rejected charitable immunity, most significantly the Supreme Court of Canada in *Bazley v. Curry*, have expressly rejected the idea that public policy permits altruistic organisations to be exempted from tortious liability because it would be socially desirable to do so. Thirdly, there is no evidence from any place that the socially desirable activities of altruistic organisations will cease if the organisations are held to the ordinary standard of liability, even if the negligent organisations themselves cease to exist.¹⁵⁷ And finally, *Jacobi v. Griffiths* does not stand for the proposition for which the majority cites it since, by its own terms, *Jacobi v. Griffiths* does not purport to nullify *Bazley v. Curry*.

In short, Marshall J.A.'s statements are *obiter*, he does not advert to the charitable immunity case law,¹⁵⁸ and the decision reads like a panegyric on churches, not a reasoned discourse on the law. Thus, the conclusion with which one is left is that the decision is less a statement of the law than it is an attempt to influence the future development of the law. In any event, Marshall J.A.'s decision is striking evidence of the fact that 140 years after the doctrine of charitable immunity was laid to rest, it still lives on in the shadows of the law.

III. Conclusion

This paper began with the point that the doctrine of charitable immunity bounces between asset immunity and enterprise immunity. After an

¹⁵³ *Ibid.* at 295-96.

¹⁵⁴ *Ibid.* at 296-97.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* at 302.

¹⁵⁷ For example, there is no obvious difference in charitable activity between American immunity and non-immunity states.

¹⁵⁸ For example, *Re Christian Brothers of Ireland in Canada*, *supra* note 3, was cited in argument and referred to by Cameron J.A. in dissent but not mentioned by the majority.

examination of almost two hundred years of charitable immunity case law from three major common law jurisdictions, it ends with the same point. Indeed, the first case to consider the doctrine seriously in 1835 held that charitable assets were immune from being used to pay a charity's vicarious liability in tort, and the last case to consider the doctrine in 2002 held that charitable enterprises were immune from being sued for vicarious liability in tort. In between these bookends, the courts of the major common law jurisdictions have considered the various theories that purport to support the immunity of charitable assets or enterprises, either completely or in some truncated fashion, and have concluded that there is no place in the law for such immunity, no matter how it is presented. The House of Lords, the Supreme Court of Canada, the Ontario, British Columbia and New Brunswick Courts of Appeal, the Federal Court of Appeals for the District of Columbia Circuit, and numerous American State courts accept that a charity, whether organised through a corporation or natural persons acting as trustees, can be found liable in tort and its property seized to pay a tort judgment, just like a corporation or natural person acting for private gain.

Accordingly, despite much debate stretching over three common law jurisdictions and touching three centuries, it is now accepted in the common law world that charity is no defence to liability or bar to exigibility. Whether the legal issue is described as one of vicarious liability (*Bazley v. Curry*), the exigibility of charitable trusts (*Re Christian Brothers of Ireland in Canada*), the ownership of charitable property (*Rowland v. Vancouver College*), or of charitable immunity itself (*Mersey Docks v. Gibbs*; *Georgetown College v. Hughes*), the leading decisions in Great Britain, Canada and the United States of America reject the notion that charities or property used for charitable purposes should in any way be protected from tort liability. This is so whether an individual human being, a corporation, or an association of natural or corporate persons owns charitable property, and whether the charitable objects are found in an actual or deemed trust or a corporation's charter.

The courts that rendered these decisions recognise that the only competing interests are those of the public who will benefit from the charitable activity and those of the individual members of the public who were harmed by the tortious acts of the charity and who seek to recover their losses from its property. Weighing, balancing, and resolving these competing interests is quintessentially a matter for public policy. It is for this reason that courts that have considered the policy implications of charitable immunity have unreservedly held that public policy prohibits courts from engaging in the utilitarian exercise of weighing the benefit to the public of preserving charitable property for the public's use against the benefit to a person harmed by a charity of using the property to pay his or her damages. Public policy, in other words, does not permit the public to benefit at the expense of a tort victim. Accordingly, despite the short life and long after life of charitable immunity, it is now generally accepted that

any protection of charitable organisations or their property, whether the property is held on a charitable trust or otherwise, arises essentially from misguided public policy, not from the law of torts, the law of trusts or the law of charity. It is to be hoped that the project of trying to protect charitable organisations and their property from the consequences of their direct and indirect misconduct and negligence will now be laid to rest.

