TORT IMMUNITY FOR NONPROFIT VOLUNTEERS

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Legislatures in the United States and Canada have recently granted varying degrees of tort immunity to volunteers in nonprofit organizations. These developments lack justification. Defective arguments and political expediency produced the new dispensations. The author exposes the weakness and adverse consequences of the immunity claim.

Récemment, au Canada et aux États-Unis, les législateurs ont accordé sans justification des degrés variables d'immunité délictuelle aux bénévoles d'organisations à but non lucratif. Des arguments fautifs et l'opportunisme politique sont à l'origine de cette dispense. L'auteur expose les faiblesses et conséquences défavorables de cette demande d'immunité.

General default liability assignments tend to be relatively stable in the law. Modifications at the operational level occur from time to time, but the basic outlines of liability remain constant. It is therefore a matter of some interest when legislatures alter conventional liability assignments in fundamental ways. That is what is happening in the nonprofit sector. Legislatures in North America are relaxing established general liability rules. Specifically, legislatures are immunizing nonprofit volunteers (and others) from liability for negligence. These developments are unprincipled. In most cases the legislation was enacted without significant public debate. There seems to be an assumption that a nonprofit motive is by itself a sufficient justification for limiting liability. There is a "halo" associated with nonprofit activity that gives rise to a generalized solicitude for nonprofit endeavors and, importantly, tends to restrain or check the critical analysis of proposals for immunity.[1] This is all quite troubling. In the few instances where legislatures have offered express justification for the immunity, the reasoning is strikingly deficient. Commentators have advanced other justifications for the special treatment of nonprofits, but they too fall short of providing a sound rationale for immunity. The following discussion begins with a

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[1] Though clearly vulnerable to critical dissection, nonprofit claims for special treatment are infrequently challenged. There is a perceived image cost to confronting the halo. See the earlier challenges at (Note), "The Quality of Mercy: 'Charitable Torts' and Their Continuing Immunity" (1987) 100 Harv. L. Rev. 1382 and A. Popper, "A One-Term Tort Reform Tale: Victimizing the Vulnerable" (1998) 35 Harv. J. on Legis. 123.

short review of the conventional legal position of nonprofit organizations. The various arguments for privileging nonprofit activity are then examined. It is concluded that there is no basis for excusing nonprofit volunteers from the application of conventional responsibility.

A History of Concessions

Nonprofit organizations are familiar with privilege. Charities initially enjoyed a general negligence immunity in the nineteenth century under the common law doctrine of charitable immunity.[2] That immunity was excised from the law of England in 1866 by the House of Lords decision in *Mersey Docks and Harbour Board Trustees v. Gibbs*.[3] As Lord Cranworth observed, the fact that trustees operated a canal on a nonprofit basis did not make "any difference in principle in respect to their liability" for negligence.[4] The doctrine lingered on in other jurisdictions for a time, even a long time, but was eventually eliminated in most.[5] Privilege, however, was soon forthcoming in other forms. Special income tax treatment became a significant benefit. There were also exemptions from property taxes and various rates, and a collection of other tangible benefits.[6]

The issue of tort liability resurfaced over the past few decades. American state legislatures initiated developments by granting immunity selectively to individuals engaged in certain kinds of nonprofit or government activity.[7] Those grants of immunity did not restore the

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[2] See (Note), *ibid*.; D. Wingfield, "The Short Life and Long After Life of Charitable Immunity in the Common Law" (2003) 82 Can. Bar Rev. 315.

[3] [1861-73] All E.R. Rep. 397.

[4] *Ibid*. at 410.

[5] See, for example, *Donaldson v. The Commissioners of the General Public Hospital in Saint John* (1890), 30 N.B.R. 279 (N.B.C.A.); *Basabo v. Salvation Army, Inc*., 85 A. 120 (R.I. 1912).

[6] The benefits have included preferences in postal rates, securities regulation, bankruptcy, competition and copyright. See, for example, R. Kielbowicz & L. Lawson, "Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal" (1988) 11 Harv. J.L. & Pub. Pol'y 347.

[7] The progression of the developments may be traced in the generally pro-immunity academic commentary. See, for example, L. Haller, "Directors' Indemnity in Nonprofit Corporations: Should Charity Begin at Home?" (1956) 11 Bus. Law. 6; C. Chute, "Personal Liability for Directors of Nonprofit Corporations in Wyoming" (1983) 18 Land & Water L. Rev. 273; J. Kahn, "Organizations' Liability for Torts of Volunteers" (1985) 133 U. Pa. L. Rev. 1433; F. Ross, "Tort Reform and the Liability of Officers and Directors of Nonprofit Organizations" (1986) 28 N.H.B.J. 137; (Note), *supra* note 1; J. Rawlings, "Liability of Officers and Directors: Extending the Safe Harbor to Nonprofit Corporate Statutory Law" (1988) 16 N. Ky. L. Rev. 345; D. Hartman, "Volunteer Immunity: Maintaining the Vitality of the Third Sector of Our Economy" (1989) 10 Bridgeport L. Rev. 63; S. Hoover,

doctrine of charitable immunity. The nonprofit organization itself remained liable. Instead, the personal liability of individual participants was excused. By 1997, most states had granted tort immunity to at least some classes of nonprofit or government workers. There was no uniformity, however, in the degree or scope of immunity conferred. In an effort to regularize the tort liability position for volunteers, the United States Congress passed the *Volunteer Protection Act of 1997* (*VPA*).[8] The statute provided nonprofit and government volunteers with immunity from liability for ordinary negligence. There were no comparable developments in Canada until 2003, when new legislation in Nova Scotia and Saskatchewan came into force.[9] Nova Scotia adopted the name, and basic framework, of the *VPA*.[10] Saskatchewan took a very different approach. Based on a seriously flawed report from the Saskatchewan Law Reform Commission, the legislature granted immunity to the directors and officers of nonprofit corporations.[11] The immunity was restrictive in that it did not extend to volunteers generally, and was expansive in that it extended to gross negligence and wilful acts and to directors who were not volunteers. Elsewhere in the Commonwealth, there were legislative developments comparable to those in North America.[12] Significantly, however, neither the Canadian federal

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"Nonprofit Corporations and Maryland's Director and Officer Liability Statute: A Study of the Mechanics of Maryland's Statutory Corporate Law" (1989) 18 Balt. L. Rev. 384; P. Swords, "An Examination of Nonprofit Board Members Exposures to Liability" (1990) C479 ALI-ABA 165; C. Tremper, "Compensation For Harm From Charitable Activity" (1991) 76 Cornell L. Rev. 401; D. Kurtz, "Protecting Your Volunteer: The Efficacy of Volunteer Protection Statutes and Other Liability Limiting Devices" (1992) C726 ALI-ABA 263; D. Barrett, "A Call for More Lenient Director Liability Standards for Small, Charitable Nonprofit Corporations" (1996) 71 Ind. L.J. 967; B. Kimery, "Tort Liability of Nonprofit Corporations and their Volunteers, Directors and Officers: Focus on Oklahoma" (1997) 33 Tulsa L.J. 683; J. Brown, "Legislators Strike Out: Volunteer Little League Coaches Should Not Be Immune from Tort Liability" (1997) 7 Seton Hall J. Sport L. 559; Popper, *supra* note 1; M. Smith, "Tort Immunity for Volunteers in Ohio: Zivich v. Mentor Soccer Club, Inc." (1999) 32 Akron L. Rev. 699; K. Biedzynski, "The Federal Volunteer Protection Act: Does Congress Want to Play Ball" (1999) 23 Seton Hall Legis. J. 319; A. Light, "Conscripting State Law to Protect Volunteers: The Odd Formulation of Federalism in Opt-Out Preemption" (2000) 10 Seton Hall J. Sport L. 9; R. Mowrey & A. Epstein, "The Little Act That Could: The Volunteer Protection Act of 1997" (2003) 13 J. Legal Aspects Sport 289.

[8] Public Law 105-19, 111 Stat. 218.

[9] There were a few existing statutory immunities confined to specific persons (some of whom might be volunteers). See, for example, s. 13 of the *Public Hospitals Act*, R.S.O. 1990, c. P. 40. Query the justification for such immunities.

[10] *Volunteer Protection Act*, S.N.S., 2002, c. 14 (in force January 1, 2003).

[11] *The Non-profit Corporations Amendment Act, 2003*, S.S. 2003, c. 33, s. 2, enacting s. 112.1. The law reform report is examined *infra* beginning at note 55.

[12] See the South Australian *Volunteers Protection Act 2001*, S.A.S., 2001, No. 65.

government nor the British government appear to have any current interest in excusing the negligence of nonprofit actors.[13]

These developments occurred at a time when there was (and is) growing concern with accountability in nonprofit organizations.[14] Commentators frequently comment on the weak control of opportunism or corruption in nonprofit organizations (weak market controls, weak monitoring incentives, less public information). Accordingly, at the same time that legislatures are questioning accountability in the nonprofit sector generally, they are dismissing accountability for failing to exercise care. It is a curious state of affairs. It may be that the nonprofit sector is strategically attempting to deflect the opportunism concern, and the associated prospect of increased regulation, by emphasizing the liability fears of volunteers. Or it may be that politicians sense that political considerations (public profile, votes, volunteer staff) favour immunity legislation.[15] There are many votes to be had from the nonprofit sector and few from negligence victims. Or it may be that the justifications for relaxing tort accountability are inherently compelling. The latter possibility is the subject of this analysis.

The Halo Effect

In the public mind, the self-denial of profit often generates a "halo" for an organization and its volunteers. Those who ostensibly renounce personal "profit" are regarded as more virtuous or public-spirited. They

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[13] The Canadian federal government opposed negligence immunity in *Reform of the Canada Corporations Act: Discussion Issues for a New Not-for-Profit Corporations Act* (Ottawa: Industry Canada, 2002) at 23 ("The framework would put the responsibility for harm where it belongs, on those responsible, rather than on those who have been made to suffer."). On English developments, see the consultation paper *Private Action, Public Benefit: A Review of Charities in the Wider Not-for-Profit Sector* (London: Strategy Unit, 2002) and the government commentary on the subject in *Charities and Not-for-Profits: A Modern Legal Framework* (London: Home Office, 2003).

[14] D. DeMott, "Self-Dealing Transactions in Nonprofit Corporations" (1993) 59 Brook. L. Rev. 131; E. Brody, "Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms" (1996) 40 N.Y.L. Sch. L. Rev. 457; W. Szymanski, "An Allegory of Good (and Bad) Governance: Applying the Sarbanes-Oxley Act to Nonprofit Organizations" [2003] Utah L. Rev. 1303; J. Fishman, "Improving Charitable Accountability" (2003) 62 Md. L. Rev. 218; D. Lee, "The Business Judgment Rule: Should it Protect Nonprofit Directors?" (2003) 103 Colum. L. Rev. 925.

[15] Politicians generally favour nonprofit organizations for a variety of reasons, including parasitic endorsement effects. See N. Knauer, "How Charitable Organizations Influence Federal Tax Policy: Rent-Seeking Charities or Virtuous Politicians?" [1996] Wis. L. Rev. 971.

claim and receive our gratitude for attending to social needs, and coincidentally relieving the rest of us from what might be uncomfortable or time-consuming activities. Officials and advocates confirm and shape that perception of virtue through periodic laudation of the role of nonprofit organizations and volunteers in building altruism, community and health. This halo has a number of significant practical effects. Specifically, the halo inspires and supports a legislative willingness to extend special benefits to nonprofit organizations. The issue is whether that effect is justified. It is not justified where the halo only supports (or conceals) self-interest.

The nonprofit sector may be divided, for immediate purposes, into two classes of undertakings. Charitable undertakings (social or public benefit) constitute one class. All other nonprofit undertakings (mutual or private benefit) fall into the second class. The halo effect is generally stronger for the charitable class, but it also benefits much of the second class. This application across classes is problematic if it leads to benefits that should otherwise be differentiated by class. The public seems generally unaware of the wide range of activities that are conducted in the nonprofit form. Many undertakings are primarily or entirely self-interested. People come together, for example, to worship idols, promote ideologies or causes, support the arts, engage in athletic pursuits, lobby authorities, establish trade or industry associations, form private clubs, or share the costs of housing or child care. These kinds of arrangements are often exclusive, and tend to be aggressively self-regarding. They are nonprofit, but in no real sense are they concerned with creating or advancing a general public interest. They may make that claim (e.g. that the arts "elevate" a community), but the primary objective of the members tends to be personal or group benefit. There is no real halo for these organizations notwithstanding their nonprofit status. Forgoing "profit" is neither conceptually nor practically congruent with regard for others. Nor is it congruent with gratuitous effort. Nonprofit means only that there will be no distributions *as profit* to nonprofit actors (no equity interests or residual claims).

The halo is an unsatisfactory foundation for the undifferentiated immunization of the nonprofit sector. Is it nevertheless a satisfactory foundation for liability concessions to *charitable* nonprofits? Should the narrower charitable class attract the special favour of the state because its principals "do good" in some broad sense? Consider the actual motives that often animate charitable participation. The acquisition of the halo itself may be the objective. The issue then reduces to whether "pursuing the halo," as opposed to pursuing the activity, justifies special treatment. In other cases the motive is spiritual, and decidedly self-interested. Salvation is the understood reward. Another motive is the necessity of observing the dictates of religious or employment duty. For others, the

motive is to acquire skills training or experience. Some are seeking to integrate into a community. Many actors exchange their service for the service of others. Many are shamed into service. Many long for companionship. Descending to more vulgar motives, entrepreneurs and professionals will offer their time to a charitable organization as a means to identify and groom prospective clients for their business. Or they may assist an organization because it has positive productivity consequences for their business, or negative consequences for their competitors. There are also individuals who establish charitable organizations primarily to provide themselves with an office or employment at a salary that consumes most of the available funds. Others seek prestige, celebrity, authority, commendation, validation, affection, influence, information, career enhancement, vitae fodder, preferential insider treatment, networking opportunities or preferential access to or entry into an elite or restricted social class or club. In many respects, the charitable sector is little more than a playground for elites, an arena for ideological and economic conflict and a platform for self-elevation and gratification. This all diminishes the "halo." It is often an illusion or a deception. There is charitable activity, but not charitable intent.

It is impossible to dismiss these motives as either uncommon or aberrant. Individuals understandably engage in charitable activities for all sorts of self-interested reasons, and the halo is their mask of rectitude. One response to that observation is that motive is ultimately unimportant, and that it is enough that the charitable activity is undertaken. That may be a pragmatic response, but it only confirms the defective calculus of uncritically granting privileges on the basis of an assumed correlation between nonprofit status and charitable motive. The nonprofit construct is too capacious to carry regulation premised on righteous motive. Even "pure" charitable motive fails as a foundation for special treatment. There is an obvious conceptual dissonance in excusing the *care* responsibilities of those who purportedly offer their *care* to others. There is also dissonance in rewarding or compensating *charity*. Moreover, it will be appreciated that there are existing rewards. There are clear psychic benefits for those who contribute their time to charities. And psychic benefits are real benefits. Charity is fully compensated by its own realization. As well, as noted above, there may be appreciable economic or other benefits. Given these rewards, what basis is there for the *further* reward of immunity? It may also be observed that it is not at all clear in what sense a purely charitable motive is ethically superior to a purely commercial motive. There is certainly no difference between these motives that would justify different liability assignments. As Justice Rutledge observed in a charitable immunity context: "Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable

wrongdoing."[16] By itself, then, the halo (whatever its intensity) does not provide a proper basis for granting special treatment to nonprofit undertakings.

The Conventional Position

The reason we (the community) hold actors responsible for their tortious conduct is straightforward. If actors were not liable for their actions, they would have an incentive to take greater risks, and the probability of loss would escalate. We do not permit the projection of risk in that unconstrained way. Instead, we discipline conduct ex ante by connecting act (or omission) with consequence. Losses are assigned to those who cause them. That liability assignment implements the social norm of risk regulation.[17] We intuitively understand the need for risk regulation. Liability both disciplines risk-taking and prevents the externalization of its adverse consequences. The freedom to take risks is not denied, it is merely conditioned. We are all obligated to take reasonable care. That is the minimal level of regulation the common law imposes on human conduct.[18] Conferring immunity on nonprofit volunteers truncates the application of the risk regulation norm.

Nonprofit undertakings are conducted through both incorporated and unincorporated structures. The risk regulation policy informs the conventional legal regulation of both kinds of structures. The default liability assignments for unincorporated nonprofit associations have been examined elsewhere.[19] Essentially, the tort liability of members of unincorporated associations is determined by the law of agency.[20] The liability assignments for corporations are different in one significant respect. Members and directors of nonprofit corporations are not exposed to liability for contractual obligations entered into on behalf of the corporation.[21] That is of no immediate relevance here, however, because

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[16] *President and Directors of Georgetown College v. Hughes*, 130 F. 2d. 810 at 813 (C.A.D.C. 1941).

[17] Consider the operation of the risk regulation norm in the context of vicarious liability. See R. Flannigan, "Enterprise Control: The Servant-Independent Contractor Distinction" (1987) 37 U.T.L.J. 25. For nonprofit associations, see Flannigan, *infra* notes 19, 20.

[18] Risk-taking is regulated, not prevented. Actors may choose to take the risk and bear the cost of any associated loss. That "license" aspect of risk regulation, which is troubling to some, identifies it as minimal default regulation.

[19] R. Flannigan, "Contractual Responsibility in Non-profit Associations" (1998) 18 O.J.L.S. 631 and note 20, *infra*.

[20] R. Flannigan, "The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments" (1998) 77 Can. Bar Rev. 73.

[21] R. Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can. Bar Rev. 247.

the liability concessions of the past few decades are concerned exclusively with tort responsibility.[22] The conventional tort liability assignments for both incorporated and unincorporated bodies are roughly equivalent. Volunteers (including directors) who act negligently will attract personal liability, and their employers or principals will be vicariously liable.[23]

The Incompetence Justification

There is one argument for immunity that is so commonly advanced, and so deeply incoherent, that it must be addressed and discarded immediately. It may be labeled the "incompetence" argument, where incompetence is broadly understood as the disutility of personal or organizational constraints on performance. The premise is that nonprofit volunteer work is differentiated or distinguished by conditions, capacities or environments that increase the probability of negligence. The argument is sometimes explicit, but more often implicit in the discussion. It is made at two levels. The conditions at the volunteer level are said to be that volunteers tend to lack the time, skills, training or commitment of employees, and cannot be expected to perform equivalent work to the same standard. The argument is that the lesser competence of volunteers, attributable in some broad sense to their volunteer status, justifies excusing them from the ordinary standard of reasonable care. They are in a sense "victims" of their volunteer ethic. At the organization level, the conditions are said to be that volunteers are less easily controlled, trained or monitored. Those conditions arise because employers of volunteers supposedly do not possess any real power to discipline volunteers and, in any event, do not want to risk the loss of gratuitous service. Employers may also be less inclined to make training or monitoring investments in their volunteer labour force. Here the lesser competence of the employer is offered as the reason to grant immunity. The proposition is that losses are attributable primarily to failures of the organization, which ought therefore to bear the liability alone.

It should be obvious that the incompetence argument is unsound. Consider the argument at the organization level. There it constitutes a standard justification for the vicarious liability of the organization.[24] It

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[22] The immunity is typically limited to ordinary negligence. There are often explicit statements in the legislation that liability for gross negligence, and criminal and fiduciary breaches, are not excused.

[23] There is the added complication for unincorporated associations of identifying the principal. The choice is usually between the members as a group and the board of directors. See Flannigan, *supra* notes 19, 20. Consider also the question of veil-piercing. See M. Caudill, "Piercing the Corporate Veil of a New York Not-for-Profit Corporation" (2003) 8 Fordham J. Corp. Fin. L. 449.

[24] See Flannigan, *supra* note 17.

does not, however, justify excusing the negligence of the volunteers. Volunteer immunity is not the corollary or necessary consequence of organization responsibility. The basis for vicarious liability is that the employer contributed to the probability of loss, not that it directly inflicted the loss. Actions of volunteers attract liability because they independently amount to negligent conduct. The risk regulation norm applies equally to both the organization and its volunteers. The argument fails in other respects. The idea seems to be that uncontrollable workers deserve immunity because they are uncontrollable. Or they deserve immunity because they are not properly trained or monitored by their employers. Those are nonsensical ideas. Volunteers are not rogues, children or automatons who lack judgment or the power or willingness to assess and adapt their own abilities. They possess, as a group, the same capacity to exercise care as the rest of the population. More generally, immunity for volunteers cannot be justified by conditions that are the result of employers choosing to avoid alienating volunteers or refusing to make risk-reducing investments. That rests the immunity solely on the self-regarding preference of employers for the consumption of volunteer labour. Lastly, there is no empirical data that indicates that volunteers are generally more resistant to instruction or training than employees. Nothing here even remotely implies that volunteers are entitled to special liability treatment.

The argument at the volunteer level is equally untenable. Volunteer *incompetence* is offered to *excuse* liability. That turns the ascription of liability on its head. Liability is our standard means to suppress negligent behaviour. The idea that volunteers must be relieved from liability because they are more likely to be fixed with liability is vacuous in an obvious way. It should be added that a supposed justification does not become more credible simply because it is repeated endlessly, or cloaked in halo rhetoric. Another observation is that there is no inherent incompetence associated with volunteer work. A lack of monetary compensation does not necessarily entail indifference to performance standards. Nor does a limited time contribution imply negligence in the performance of tasks undertaken during that time. Nor is the degree of commitment to an organization or cause determinative of the degree of care that volunteers exercise. As for skill and training, there is no basis for assuming that volunteers are generally less skilled or qualified than employees. Some volunteers will be less able, but many are recruited for their expertise. Moreover, the relative ability of volunteers is presumably accommodated in the nature of the tasks they are asked to perform. We do not, at any rate, generally establish formal liability gradations based on degree of ability. Apart from those considerations, the difficulty with the incompetence argument is that it casts volunteers as incomplete or diminished beings who are unable to comprehend or address their own

weaknesses and liability exposure. Volunteers are characterized as "weak," or "hostage" to their volunteer status. That weakness supposedly explains, and excuses, their negligence. Such a conception of volunteers is neither accurate nor acceptable.

The Volunteer Protection Act

The American *VPA* immunizes nonprofit and government volunteers against liability for ordinary breaches of care.[25] It clearly alters the conventional scope of the risk regulation norm in a fundamental way. It does this on the basis of a set of doubtful propositions and an underlying premise of moral equivalency between the fear of liability and actual injury. The statute sets out the Congressional "findings" that ostensibly justify the liability exemption.[26] The first finding is that "the willingness of volunteers to offer their services is deterred by the potential for liability actions against them."[27] That is the standard "recruitment" argument that is deployed against every legal rule that involves potential personal liability.[28] It is an empty argument. We are all "deterred" by liability rules for every action we take, whether in a nonprofit context or

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[25] *Supra* note 8. Section 4(a) in part reads: "Except as provided in subsections (b) and (d), no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if (1) the volunteer was acting within the scope of the volunteer's responsibilities …[and]…(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer…."

[26] *Ibid*., s. 2(a). A number of states also include statements of justification in their legislation. Consider the statement in the *Arkansas Volunteer Immunity Act*, Ark. Code, §16-6-102:

> Since the spirit of volunteerism has long animated citizens of this state to give of their time and abilities to help others, the State of Arkansas would be wise to ensure that qualified volunteers shall not be civilly liable for personal injury or property damage resulting from any act or omission in carrying out their authority or responsibilities as volunteers. While there are no known recent instances in Arkansas where a volunteer has been subjected to personal liability for negligence in performing volunteer duties, and there are no cases presently known to be pending, the recent publicity generated in relation to the perceived insurance crisis has heightened concern among many who would provide volunteer services, making it more difficult to provide certain important services, cultural and educational events, and other opportunities to the citizens of the State of Arkansas through voluntary services. This subchapter limits and defines the liability of volunteers in order to diminish their concern with regard to personal liability associated with volunteer work, in order that the state might maximize this important human resource.

[27] *Ibid*., s. 2(a)(1).

[28] See the discussion of the recruitment argument in Flannigan, *supra* note 21 at 313-17.

elsewhere. That is an *intended* deterrence. It is neither unprincipled nor oppressive. We, as a community, intend that actors consider the liability cost of acting negligently. We all understand our potential liability for negligence. We are exposed to that liability in our jobs, our homes, the course of our recreational pursuits and at all other times. The only difference for volunteers (those in charitable nonprofits) is that they are serving others gratuitously at the time of their careless action or inaction. There is no evident reason why that should alter the liability assignment.[29] The negligence occurs in the same way and the losses are felt in the same way. There is no lesser need to deter negligent conduct simply because the context is a nonprofit one. None of this, however, is addressed in the statutory justification. Instead, the second finding is that "as a result" of the inhibition of volunteers, the nonprofit and government sectors "have been adversely affected by the withdrawal of volunteers from boards of directors and service in other capacities."[30] A first response to that finding is that there is no empirical data that establishes a general withdrawal of volunteers. There was no decline in volunteerism in the years preceding the legislation.[31] As for supposed adverse effects, they are the expected consequence of the withdrawal of any worker. The solutions for a nonprofit organization are the same as for other organizations. The immediate solution is to replace the withdrawing volunteer with another. If replacements are not available, it is likely there are more fundamental problems with the organization. Another solution is to discourage withdrawal by satisfying volunteers that liability risks have been addressed and that adequate insurance is in place.[32] Risks may

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[29] If that were the animating difference, it would justify immunity for parents who caused harm to others while carrying out their parental responsibilities.

[30] *Supra* note 8, s. 2(a)(2).

[31] See Tremper, *supra* note 7 at 413-19; Popper, *supra* note 1 at 146-47 and the observations of the dissenting representatives at H.R. Rep. 105-101, 105th Congress, 1997. See also *State Liability Laws for Charitable Organizations and Volunteers* (Washington, D.C.: Nonprofit Risk Management Center, 2001) at 4 ("The statistics on volunteerism collected by the national umbrella organization Independent Sector counter the notion that fear of liability has dissuaded large groups of people from volunteering. According to Independent Sector, between 1980 and 1995, the number of volunteers in the United States grew from 80 million to 93 million, an increase of 16 percent, and a record 90 percent of individuals volunteered when asked....[W]e have yet to hear from someone whose fear of liability has led to the decision to cease participating as a volunteer in any form. We occasionally hear from individuals who have decided to leave an organization because of concern about the practices of a specific nonprofit. The volunteer's concern may focus on poor record keeping, dispassionate employment practices, troubling conflicts of interest in the organization's relationships with vendors, or other issues.").

[32] See the discussion of risk management (loss prevention and coverage) by S. DeFrancesco, *Understanding and Managing Liability Risks Associated With Providing Injury Prevention Services and Advice: A Guide for Injury Prevention Practitioners*,

be addressed and controlled, for example, by the installation of safety systems and proper training. Where those measures fail to prevent a loss, volunteers will have the comfort of insurance cover. There are no features of nonprofit activity that prevent or fetter these solutions.

Responding to a liability "fear" with a liability reduction is an extreme reaction and one that has negative effects overall. It is an extreme response because responsible governments could openly reject immunity proposals with the full support of an *informed* general public. Governments could, alternatively, sponsor training programs or establish mandatory insurance schemes funded by taxes or levies on the nonprofit sector. That would properly engage nonprofits in a demonstrated commitment to risk management. A liability reduction, however, is unacceptable. The ultimate consequences or effects are negative. Once the discipline of the legal duty of care is removed, there will be an incentive to take greater risks (because the losses are borne by others), and the probability of loss will increase. The nonprofit sector will become a more hazardous sector for everyone, particularly recipients of services, employees and volunteers themselves.[33] To a government, a liability reduction appears to be a cheap and politically popular option. That response only quiets the liability alarm, however, by increasing the risk of loss to the entire community.

The third finding set out in the *VPA* is that, in the absence of volunteers, "the contribution of [nonprofit and government] programs to their communities is thereby diminished, resulting in fewer and higher cost programs."[34] It may be observed, however, that communities do not have absolute entitlements to programs that survive only by reason of the gratuitous contributions of citizens. Each community will benefit in accordance with the level of volunteerism it is able to maintain. Moreover, there is no credible pejorative association between, on the one hand, "fewer and higher cost programs" and, on the other, the functioning of the law in promoting the exercise of reasonable care. It is also worth reiterating that not all nonprofit organizations are concerned with making contributions to their communities. Further, the *VPA* discriminates within the nonprofit sector by providing the immunity benefit only to those organizations that utilize volunteers. The effect is to "diminish," relatively speaking, those nonprofit programs that use few or no volunteers.

Center for Injury Research and Policy, Johns Hopkins Bloomberg School of Public Health, 2004. See also *Directors' Liability: A Discussion Paper on Legal Liability, Risk Management and the Role of Directors in Non-Profit Organizations*, Volunteer Canada, 2002 (Query the discussion in the document of the utility of incorporation.).

[33] Volunteers and employees in many nonprofits interact most frequently with each other and will therefore be the most common victims of each other.

[34] *Supra* note 8, s. 2(a)(3).

The fourth finding is that federally funded social service programs "depend heavily on volunteer participation" and that, consequently, it is appropriate for the government to limit personal liability risks.[35] That finding is amplified by the later statement that the government is economically interested in the numerous programs that are supported by volunteer effort.[36] Those statements amount to a confession that the government is serving its own interests. It is an oddly candid (possibly unappreciated) formal expression of a clear conflict of interest. This is not a case where the government has a symmetrical interest with all of its citizens. It apparently granted the immunity with the dominant intention of easing its own economic and political burdens. Additionally, the subtext of these particular findings is that the loss of volunteer services will lead to government disinvestment or, alternatively, increased taxation to fund the programs. These implications are presumably intended to attract the support, respectively, of the beneficiaries (and employees) of programs and the tax-paying public. There is no principle in any of this, only indelicate expediency.

The fifth finding is that "services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities."[37] On the face of it, that finding would appear to undermine or defeat the supposed need for immunity. The intended implication, presumably, is that private provision of these programs is somehow inappropriate, or that previously subsidized or gratuitous services will only be available at market prices. But none of this is clear and, in any event, does not provide discernible support for a liability exemption.[38]

The sixth finding is that "due to high liability costs and unwarranted litigation costs, volunteers and nonprofit organizations face higher costs in purchasing insurance."[39] Further on in the section there is a reference to "the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits."[40] The significance of the assertion that liability costs are high is difficult to understand. A few cases out of thousands will produce a "high" award relative to other awards. Presumably that is because the losses in those cases are devastating. Even so, those high awards have little overall impact on efficient insurance rates. If the assertion is instead that the general level

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[35] *Ibid.*, s. 2(a)(4).

[36] *Ibid.*, ss. 2(a)(7)(B),(C).

[37] *Ibid.*, s. 2(a)(5).

[38] Consider the fairness and efficiency of subsidized nonprofit participation in competitive markets.

[39] *Supra* note 8, s. 2(a)(6).

[40] *Ibid.*, s. 2(a)(7)(A).

of liability awards is high, the startling implication seems to be that losses should not be recoverable at all or beyond a certain cap.[41] The other component of the finding is that "unwarranted" litigation costs have elevated the cost of insurance. That is another startling proposition. What litigation costs are unwarranted? What empirical evidence exists for the proposition?[42] Those who feel aggrieved at the hands of others are entitled to pursue their claims. Those who deny such claims are entitled to defend themselves. If defendants correctly conclude that there is no valid claim, they may secure the end to litigation through a motion to strike. That is the standard device employed to control unwarranted litigation. Short of that, the litigation will properly proceed. How is any of that problematic or unreasonable in a society that allows its citizens to enforce and defend their rights? It is of some significance, on this point, that the legislation does not purport to extinguish or even discourage unwarranted litigation costs.

It is not uncommon for both business and nonprofit advocates to use insurance costs in attempts to lever special liability treatment from governments.[43] The thinking here, however, is defective. Insurance is just one of many discretionary costs for any undertaking. It is unclear why that cost would command a legal significance greater than other inputs. There are, for example, no calls for liability exemptions based on increased costs for safety equipment or training programs. Insurance premiums are just the optional cost of closing off a risk at a price determined by the loss experience of the insured group. Assuming honest and efficient insurance providers, increases in premiums reflect increased costs, presumably mainly in loss payments.[44] It is incoherent for a legislature to respond to that cost increase with a liability reduction. That would be a logical error. It would also be an economic mistake. The legislated immunity will have the effect of raising the cost of insurance even higher. Immunity breeds risk, which increases loss, which in turn increases insurance costs. Recall that the nonprofit organization itself is not excused from liability. It remains vicariously liable. It will therefore purchase insurance and now have to pay a higher price. In the result, the legislation elevates risk and actually produces a greater insurance burden for the nonprofit sector as a whole.

It is specious to conclude, as some do, that higher insurance costs are not bearable by many nonprofit undertakings. They are not "bearable"

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[41] See Flannigan, *supra* note 21 at 318-20.

[42] Popper, *supra* note 1 at 130-31; Kurtz, *supra* note 7 at 292-93; Kimery, *supra* note 7 at 687.

[43] See Flannigan, *supra* note 21 at 312-13.

[44] That may not always be the case. Some recent insurance cost increases were apparently instituted to make up for investment losses experienced by insurers.

because organizations do not give them sufficient priority on their list of expenditures. Organizations naturally *prefer* to direct their resources to their nonprofit activities, but that is a choice. In that sense, the increase in cost is not unbearable, it is merely unpalatable. It is precisely the same in the business sector, where there is no agitation (or prospect) for a liability reduction for the workers of small thinly capitalized businesses. Recall again that the legislation does not eliminate the need for insurance. Accordingly, every nonprofit will still have to choose to insure or self-insure. The few organizations that cannot insure because they are absolutely impecunious and cannot afford the premiums payable for their particular profile and loss experience will likely have no capacity to absorb a significant liability judgment and will therefore leave uncompensated victims. It may be preferable that those organizations are culled from the nonprofit sector by cost considerations before their underdeveloped or under-funded systems produce that result.

Negligence awards and insurance costs are signals that there are consequences for failing to take due care. As prices (awards and premiums) increase inordinately, the signal is that there is deterioration in the level of care.[45] Those are necessary signals. They are admonitions that we need to adjust our behaviour. In that respect, the "fear" they engender is an expected response.[46] It is constructive fear. We want the signal to be heard, and behaviour patterns to change. Fear of potential "financial ruin" is not a sufficient reason to distort these signals. Financial ruin attributable to a negligence award is contingent, relative and extremely rare. Further, no one is left naked and homeless by liability awards, even if uninsured. The relatively generous bankruptcy option provides an ultimate financial cap for those who cause substantial loss to others. That is the universal social cap for all legal liabilities. It is an option hundreds of thousands of North Americans exercise each year. Another observation is that individuals with significant assets will rarely be ruined by large judgments because they are most likely to be protected by insurance. If they do have to pay, they are in the enviable ethical position of being able to fully answer for the injuries they cause others. The lament over the prospect of financial ruin or hardship is out of all proportion to the actual financial impact of liability awards, and certainly the actual hardship of victims.[47] It is also inconsistent with our own individual expectations that others will make us whole when we are harmed by their negligent actions.[48]

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[45] There are non-monetary aspects to prices. For example, reducing the scope of insurance coverage while leaving the "price" constant is in fact a price increase to the insured.

[46] Assuming the "fear" is not a psychotic or other irrational reaction.

[47] See the general discussion at Flannigan, *supra* note 21 at 313-21.

[48] There is no concurrent provision for mutuality or equivalency in the sense that

Following the list of Congressional "findings," the *VPA* set out its purpose: "The purpose of this Act is to [promote and sustain programs] that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities."[49] That statement of purpose is meaningless. What are the supposed "liability abuses"? None of the listed "findings" describe or establish any unaddressed abuses. Is this instead an oblique reference to the "ingratitude" of victims who presume to sue their service providers? It appears, in the end, that Congress was not able to identify any actual substantive mischief requiring a liability reduction and therefore resorted to general halo rhetoric to obscure its own political and economic interests.[50]

Canadian Immunity Legislation

The Nova Scotia and Saskatchewan governments differed in the level of justification they offered for their legislated immunities. Having enacted a stripped down version of the American *VPA*, the Nova Scotia legislature presumably relied on the justifications set out in that statute.[51] In the legislature itself, as has been the case elsewhere, the discussion was brief and supportive of the immunity.[52] There was no discussion of risk regulation and no mention of the future victims of negligent conduct.[53] In Saskatchewan, the attempt at justification was more extensive. The matter was first examined by the Saskatchewan Law Reform Commission. Subsequently, in the legislature, uncritical cross-party support dominated a short discussion.[54] There were no unpleasant

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nonprofit volunteers pay for their immunity by accepting immunity for those third parties who injure them (the volunteers) in the course of their nonprofit activities.

[49] *Supra* note 8, s. 2(b).

[50] Before moving on to the Canadian legislation, it may be noted that the *VPA* does allow states an option that partially addresses the potential negative effects of the legislation. States are permitted to condition volunteer immunity on nonprofit organizations providing a "financially secure source of recovery (e.g. insurance cover) for individuals who suffer harm as a result of actions taken by a volunteer." That internalizes the compensation function to nonprofit organizations in states that impose that condition, and in that respect is superior to an unconditional immunity. It does not, however, prevent the increase in general risk attributable to personal immunity. See also Tremper, *supra* note 7.

[51] *Supra* note 10.

[52] *Hansard* (2 April 2002; 9 October 2003).

[53] One member wondered whether it was "nothing more than a public relations exercise by the Minister of Justice to bring to the House what would generally be considered to be goodwill legislation."

[54] *Hansard* (23 May 2003; 5 June 2003). The discussion suggests the government misunderstood the state of the existing law.

references to those who might be injured or to the *cost* of immunity (increased risk). That leaves the earlier analysis of the law reform commission as the best evidence of the thinking of the Saskatchewan legislature. Initially the commission released a discussion paper.[55] That paper was substantially reproduced as a report to the legislature.[56] The legislature debated the issue and then enacted the liability reduction as an amendment to the Saskatchewan *Non-profit Corporations Act, 1995*.[57] The directors and officers of nonprofit corporations were granted immunity for ordinary negligence, gross negligence and wilful acts.

The report of the law reform commission is a tangle of weak research, platitudes, contradictions, exaggeration and otherwise unsatisfactory analysis. The commission introduced its discussion with the usual observation that volunteer effort is important and valuable to communities.[58] According to the commission, the volunteer base was threatened by two fears – the fear of liability and the consequential fear that the recruitment of members would become more difficult for nonprofit corporations. Three observations are in order here. The first is that while there may be "fears" of liability and recruitment difficulties, there is no evidence of actual liability to ground either fear. There is no data in the report or elsewhere that establishes that liability exposure is greater in the nonprofit sector than elsewhere. Nor would such evidence be expected. The negligent infliction of loss does not depend on profit motive. The second observation involves pointing out a contradiction, or a form of analytical duplicity, in the report. The discussion throughout the report was premised on justifying immunity for *volunteers*. Ultimately, however, in what amounts to the compromise of much of the commission's analysis, the requirement of volunteer status was discarded. The commission recommended, and the legislature delivered, immunity for *all* directors and officers, whether paid or not. The laconic justification for that reversal, inserted near the end of the report, was that "it may be difficult to distinguish a compensated director from one who is merely reimbursed" and that the immunity provision "should be as straightforward as possible."[59] That reasoning is specious on its face. Additionally, it amounts to a conceptual concession that volunteer status

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[55] *Liability of Board Members of Not-for-profit Organizations*, Law Reform Commission of Saskatchewan Consultation Paper, 2001. Consultation appears to have been limited to groups supportive of a liability reduction.

[56] *Report on the Liability of Directors and Officers of Nonprofit Organizations*, Law Reform Commission of Saskatchewan Final Proposals, 2003.

[57] *Supra* note 11. Section 112.1(2) states that: "Unless another Act expressly provides otherwise, no director or officer of a corporation is liable in a civil action for any loss suffered by any person."

[58] *Supra* note 56 at 2.

[59] *Ibid.* at 44.

is not a relevant distinguishing characteristic for the application of negligence liability. The related third observation is that the commission did not recommend immunity for ordinary (non-executive) volunteers. That is a curiosity that signals incoherence.

The commission began its analysis by observing that there were a number of legal mechanisms that impose "accountability" on the nonprofit sector.[60] The mechanisms identified were the dissolution of a nonprofit corporation, the withdrawal of funding, replacement of the board of directors, suing the organization and suing individual board members.[61] The commission concluded that while "all of the other mechanisms listed above could no doubt be improved, only the individual liability of board members is a questionable means of ensuring accountability."[62] According to the commission, personal liability was questionable for a number of reasons:

> Potential liability may sometimes encourage board members to act more carefully and cautiously. But the price is high, and the benefit may be small. In the worst case, individual board members may be held personally liable for injury claims that will ruin them financially. Directors' and Officers' liability insurance is available, but the cost is often higher than many organizations can bear, and the scope of coverage is limited in any event. Many of the situations that are most apt to give rise to liability are difficult to predict, and difficult for even well-motivated board members to guard against.[63]

That analysis is wholly deficient. The commission discounted, without explanation, the conventional utility of defining and applying a legal standard of behaviour to regulate the conduct of directors and officers. Its singular baffling comment was that the benefit "may be small." The commission asserted that the price of risk regulation "is high," but only referred to the "worst case" of financial ruin. It neglected to point out that we all are exposed to that remote possibility in all of our activities. It will be appreciated, moreover, that the financial ruin rationale would justify

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[60] The report speaks of accountability in at least three undifferentiated senses: accountability for care (negligence), accountability for loyalty (fiduciary duty) and accountability for proper performance. The failure to differentiate confuses the analysis.

[61] *Supra* note 56 at 2-3. The commission speaks throughout its report about "board members," yet recommended immunity for both directors and officers. Officers will not in every case sit on the board. More significantly, the commission never addresses the differences between directors and officers and how those differences might affect the immunity question.

[62] *Ibid.* at 3. It is unclear how any of the mechanisms could "be improved." It must be obvious that the first three mechanisms (dissolution, funding withdrawal (by whom), replacing the board) are not workable controls on negligence.

[63] *Ibid*.

immunity for the entire population and therefore, obviously, is not a satisfactory justification for an immunity restricted to nonprofit volunteers. A further general observation is that the price is never "high," it is simply the value of the actual loss inflicted on others. The commission went on to state that, while insurance could be purchased, the cost is often unbearable and coverage is limited. As noted earlier, however, the cost is always bearable. As for the supposed limitations on coverage, the one type of conduct clearly covered in standard insurance contracts is ordinary negligence. Gross negligence, equally clearly, tends not to be covered. That only confirms the inappropriateness of immunity for either kind of conduct. The last argument in the extract is that liability risks are difficult to predict or guard against. To the extent that is true, it is true in all sectors, and does not constitute a distinguishing rationale. It may also be noted that unforeseeable (unpredictable) losses do not give rise to liability. Nor, in fact, is it "difficult" to guard against the possibility of liability. It may be costly to take safety measures or to insure, but it is not "difficult" in a way that implies a liability reduction.

The commission took the position that other mechanisms or approaches should be employed to address the recognized need for accountability on the part of directors and officers. It referred to "education about their roles, well articulated codes of conduct, and improved models for structuring board activities" and stated that initiatives of that kind were under consideration elsewhere.[64] The commission concluded that "improved education of board members about their roles and responsibilities is the key to ensuring that the not-for-profit sector is accountable and responsive to public needs."[65] Those improvements, the commission believed, should accompany the limitation of the personal liability of board members. Unfortunately, the commission did not further discuss or develop this "education" approach to accountability. The analysis was therefore incomplete in a significant way. The commission recommended removal of the conventional negligence control without replacing it with some other satisfactory control. Liability was shifted, but the conventional basis for the liability (exercising care) was not addressed. Beyond that, it must be obvious that education alone is inadequate. Negligent conduct will not be entirely, or even largely, eradicated by education. Conventionally, education and liability are complementary, not alternative, controls on negligence. The commission did not demonstrate that the conventional liability assignment was misconceived.

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[64] *Ibid.* Insurance was not identified as an accountability mechanism even though it has incentives (e.g. premiums and coverage based on individual loss experience) that offset the possible insurance effect of liability ambivalence.

[65] *Ibid*.

The remaining bulk of the report is similarly analytically impoverished. It has no traction. It lurches from weakness to irrelevance and back again on both law and policy. There is, for example, the usual reference to the large scale and significance of volunteer activity. That is not qualified, however, as it should be, by the fact that the commission was recommending immunity only for directors and officers, not volunteers generally. Even on its own terms, the reference offers no support for immunity. Highlighting the scale of volunteer effort only emphasizes the scale of potential injury and loss that is at stake. The discussion of "accountability" throughout the report is another example. It is never really clear what sort of accountability is under discussion. Nor is it made clear how any accountability other than that for the exercise of reasonable care is material to the question of negligence immunity.

Another illustrative discussion is that addressing why director and officer liability is supposedly an "important issue." The discussion wanders from paragraph to paragraph without making a relevant or compelling point.[66] Nothing is ever credibly linked to a supposed need for a liability reduction. Many statements are quite inexplicable. The commission asserted, for example, that the liability issue for board members was different than for the organization itself, its employees and its volunteers. In the case of the organization, the commission considered that organizations forced into insolvency by liability awards would be replaced by other organizations. The commission also stated that "the right of injured parties to seek compensation from an organization that caused harm cannot be lightly dispensed with."[67] There was no attempt on the part of the commission to explain why these considerations did not have equal application or relevance to directors and officers. Nor did the commission explain its apparent distinction between employees and officer employees. That distinction is glossed over throughout the report. Query what justifies *immunity* for an officer, but *liability* for the same conduct by an employee. Query also why the immunity was not extended to officers and directors of unincorporated associations. What difference justifies that distinction?

As for the supposed difference with volunteers who are not directors or officers, the commission *wrongly* stated that ordinary volunteers are unlikely to be found liable when they are acting within the scope of their authority and that board members are vicariously liable for the acts of volunteers and employees.[68] The commission also asserted, without any empirical support, that the risk from volunteer action is "largely under the

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[66] *Ibid.* at 6-10.

[67] *Ibid.* at 9.

[68] *Ibid.* See Flannigan, *supra* note 21.

control of the volunteer, and is more easily guarded against by appropriate insurance than the risks potentially faced by board members."[69] That proposition is demonstrably wrong in most, if not all, cases. It is also important to note that removing officers and directors from the liability pool will *increase* the likelihood that ordinary volunteers who are jointly liable for the loss will be pursued and required to bear the loss alone where the organization is insolvent.[70]

The commission went on to observe that many board members lack business or managerial experience, can devote only limited time and attention to their duties and find it difficult to identify risks that might lead to personal liability. That is nothing more than the "incompetence" argument. Moreover, there is no explanation of how those characteristics differ, if at all, from the characteristics of volunteers who are not board members. None of the characteristics, in any event, justify a liability reduction. Elsewhere the commission also noted that some directors sit on the board as fund raisers or because of their donations. That observation, however, only indicates that many individuals expect or receive power and recognition in the form of an appointment to the board. That does not in any way suggest that they should be excused where they fail to act with care. There is no virtue in the blanket absolution of the actual injury they cause others.

Although the commission conceded that "[a]t present, the threat of personal liability is an inducement, perhaps the only legally-binding inducement, to board members to act diligently," it nevertheless concluded that "both accountability and compensation can be ensured in better ways than holding volunteer board members personally liable for all board decisions and for acts done by the organization and its agents."[71] The commission, however, did not thereafter identify the "better ways" of ensuring "accountability and compensation." There was no discussion of compensation at all. The subsequent discussion of accountability consisted of a single paragraph referring to the need for education and information. In the final chapter, where the "better ways" were to be considered, the discussion consists of little more than a collection of the usual excuses for volunteer negligence (e.g. volunteer board members have little time, skill or experience and tend to rely too readily on managers and officers) and an unjustified discounting of

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[69] *Ibid.* This appeal to an insurance solution contradicts the earlier dismissal of that mechanism (for alleviating the fear of liability).

[70] As a practical matter, personal liability is most likely where the organization is insolvent. In that respect (and generally), the open liability of the organization can not justify the immunity of volunteers. The victim will not in fact be compensated by the organization.

[71] *Supra* note 56 at 12.

indemnity and insurance solutions.[72] There was also a shallow and dated review of immunity legislation in the United States that revealed that the commission was not even aware of the most significant development in the United States – the enactment some six years earlier of the *VPA*. Despite the weakness of its arguments, the commission was convinced that personal immunity for directors and officers was appropriate. It confidently asserted that "[a]ny other approach…would be piecemeal and unsatisfactory."[73] That latter observation, it should now be apparent, describes the commission's own report. The commission removed the "only legally-binding inducement...to act diligently" without providing "better ways" to regulate the exercise of care. It did this on weak research and without a full and objective examination of the conventional rationale for negligence liability. It was a "piecemeal and unsatisfactory" effort.

The report is entirely unsatisfactory on another point. At the very end of the report, the commission extended the immunity to *wilful* and *grossly negligent* acts.[74] That is an incomprehensible recommendation. The justification the commission offered was that, in practice, the distinction between ordinary and gross negligence "was uncertain" and that, once again, "the immunity provision should be as straightforward as possible, providing clear protection."[75] While it is the case that ordinary and gross negligence are difficult to distinguish both conceptually and in practice, that fact instead *supports* the conventional assignment of liability for any degree of negligence.[76] The conventional liability for both ordinary and gross negligence (and wilful acts) flows from the one risk regulation policy. There is no evident basis in social policy for the immunity the commission sponsored.

Finally, it is instructive to consider the incentives produced by the peculiar Saskatchewan immunity. Because the liability reduction is only available to directors and officers of nonprofit corporations, there is a new incentive for nonprofit associations to incur the significant costs of corporate status.[77] Law firms will benefit from that effect, both from

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[72] *Ibid*. at 39 *et seq*.

[73] *Ibid.* at 42.

[74] *Ibid.* at 45-46.

[75] *Ibid.* at 45. Another analytical indignity occurs here. The commission purported to justify its uncertainty point by reference to the legislated removal of the distinction between ordinary and gross negligence for guest passenger liability. The commission neglected to point out that the reforming legislation did not relieve drivers from liability for either gross or ordinary negligence. Rather, the liability of drivers was *expanded* to include liability for ordinary negligence. Accordingly, there is no inference in favour of immunity to be taken from the guest passenger context.

[76] See Flannigan, *supra* note 21 at 264 *et seq*.

[77] Associations that incorporate to secure tort immunity are substituting liability

incorporation and corporate maintenance fees, and from avoiding the supposed complexity of the law of unincorporated associations. Lawyers will also benefit from the additional liability protection (as will other professionals and politicians) when they sit on nonprofit boards for client development and other strategic reasons. The self-interest of lawyers in the incorporation/insurance choice is plain. Second, there will be an incentive for employees and ordinary volunteers to become directors and officers in order to acquire immunity. Some organizations will take this to the extreme of having everyone connected with the organization made either an officer or director, thereby circumventing the purported scope of application of the immunity. Though not an intended effect, it is one that is predictable, and likely. A third incentive will be for nonprofit groups in other provinces to incorporate under the Saskatchewan legislation and then carry on their activities in their home province and elsewhere as extra-provincial corporations. That presumably was not an intended effect, unless Saskatchewan believed it could capture a greater share of the market for nonprofit incorporations. Apart from that, the effect will be the exportation of Saskatchewan nonprofit social policy into other provinces without the concurrence of those governments. A fourth incentive is for business undertakings to structure some or all of their ancillary activities as nonprofit operations. Firms might spin out administrative support, marketing efforts or other functions into nonprofit corporations. Some business undertakings may even incorporate or convert their entire operation into debt-financed nonprofit corporations that distribute value through salaries, bonuses, sweetheart contracts and perquisites. That option is available to any organization that does not require access to the equity market. These incentives are of considerable concern for obvious reasons. Their creation will also produce vested interests in the retention of the immunity, as opposed to its reversal. Other provinces will eventually adopt the same immunity because they will not be able to resist calls for equal accommodation from their own nonprofit sectors. The immunity will be replicated elsewhere by force of envy, rather than dismissed for want of a sound rationale.

The view of the commission seems to be that immunity for directors and officers is an unambiguous good. The commission's analysis, however, is distorted and contrived, and does not produce a solution that is responsive to the supposed mischief. Overall, it constitutes a pronounced law reform blunder. The general liability assignments of the common law are not capricious artifacts of a brutish and unsympathetic

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evasion for liability insurance. The initial and ongoing costs of incorporation, however, will fully or partially offset any savings from forgone investments in insurance. In fact, costs will likely only increase because it will be regarded as imprudent (properly so) to forgo insurance in reliance on the immunity. Immunity is then, at best, expensive contingent, largely redundant, protection.

judiciary. They are the product of centuries of reasoning and testing, and they operate subject to proper internal constraints. The commission recommended that we sweep away a substantial component of that regulation without any inquiry into basic purpose. The members of the legislature were influenced by that faulty analysis, by the halo effect and by their own appreciation of the political and personal benefits the legislation provided to them.

Further Arguments

We have examined some of the arguments offered by legislatures to justify negligence immunity for nonprofit volunteers. Commentators have offered other economic, political and sociological explanations for nonprofit activity that might be thought to provide independent justification for volunteer immunity. Much of that work addresses the tax privileges of nonprofits.

The most prominent economic argument, an early attempt at an agency cost analysis, is that nonprofits fill niches that exist as a result of "contract failure."[78] That kind of failure is said to occur when information asymmetries affect the assessment of goods and services, particularly when value is directed to a third party. It may be impossible or impractical to assess both potential and actual contractual performance. The result is that "ordinary market competition may be insufficient to police the performance of for-profit firms, thus leaving them free to charge excessive prices for inferior service."[79] That contract failure is remedied, it is argued, by making the investment (donation) through a nonprofit vehicle, where no distributions are permissible (the non-distribution constraint) and, consequently, there is less incentive for shirking or opportunism. Though popular, this argument is problematic.[80] There is no "failure" of any kind. The market works as expected. There are just higher contracting (investigation) costs and

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[78] H. Hansmann, "The Role of Nonprofit Enterprise" (1980) 89 Yale L.J. 835. See also H. Hansmann, "Economic Theories of Nonprofit Organization," c. 2 in W. Powell, ed., *The Nonprofit Sector: A Research Handbook* (New Haven: Yale University Press, 1987); N. Crimm, "An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation" (1998) 50 Fla. L. Rev. 419; D. Jones, "The Scintilla of Individual Profit: In Search of Private Inurement and Excess Benefit" (2000) 19 Va. Tax Rev. 575.

[79] H. Hansmann, "The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation" (1981) 91 Yale L.J. 54 at 69.

[80] See the criticisms of I. Ellman, "Another Theory of Nonprofit Corporations" (1982) 80 Mich. L. Rev. 999; S. Permut, "Consumer Perceptions of Nonprofit Enterprise: A Comment on Hansmann" (1981) 90 Yale L.J. 1623; R. Atkinson, "Altruism in Nonprofit Organizations" (1990) 31 B.C.L. Rev. 501; Brody, *supra* note 14; Crimm, *supra* note 78.

higher enforcement costs. Information asymmetries do not in themselves allow firms to charge excessive prices for inferior service. That will not occur, other than temporarily, because excessive prices will be competed away by others in the market. Accordingly, there is no contract failure for nonprofits to exploit. Nor is there a lessened incentive for opportunistic conduct. The nonprofit structure, it has been noted, actually heightens the prospect of opportunism. The reasons nonprofits succeed are rather more straightforward. The value of volunteer labour is obviously a factor, but there are other significant factors. Charitable nonprofits, in particular, succeed in part because they typically have the advantage of access to both donations and tax exemptions.[81] Charities also *sell* charity to their supporters in a number of senses. There is clearly a market for halos. Charities also undertake to perform charitable services essentially at cost. Donors patronize nonprofits because the principals of the nonprofit organization are, at least formally, making a donation of their own by foregoing any equity return on their effort. Success for other nonprofits is less assured because they do not qualify for the charitable tax exemption. They have the uncertain advantage of not having to compensate equity participation, but they suffer from an attenuation of effort.[82] Consequently, they tend not to supplant for-profit enterprise unless "profit" is taken in indirect non-financial ways.[83]

It should be evident that the contract failure argument provides no justification for a liability reduction (which itself is a distortive government action). Even if the argument were sound, it has no application to, or implication for, the negligence of volunteers. The mischief it is concerned with is impractical performance assessment, not negligence or a negligence fear. The rationale is unconnected to the exercise of care. The same observation applies to other economic arguments.[84] Only standard agency cost analysis touches the negligence issue. The agency argument points to the likelihood that agents will shirk or act opportunistically if their interests are not fully aligned with those of their principals.[85] The analysis extends to lapses in care, but there is

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[81] Often the determinative factor is the *commitment* of the principals and supporters of the undertaking. There is an intangible edge to that commitment that translates into something more than the contribution of money and labour capital.

[82] Mutual or private nonprofits experience serious shirking problems. Supporters of charities offer somewhat greater constancy because of their ostensibly deeper commitment to the charitable cause.

[83] The "profit" in lobbying organizations, for example, is taken directly from the non-monetary production (favourable political action).

[84] E.g. B. Bittker & G. Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation" (1976) 85 Yale L.J. 299.

[85] See Brody, *supra* note 14; G. Manne, "Agency Costs and the Oversight of Charitable Organizations" [1999] Wis. L. Rev. 227; R. Katz, "Can Principal-Agent

no suggestion in such analyses that the proper solution is to excuse the liability of the agent. That, for economists, would be a preposterous solution.

The main political explanation for nonprofit activity is government failure.[86] Governments are justified in entering markets that are defective. Governments, however, may not always be capable of addressing market failure. There are political feasibility and other constraints on government action.[87] Governments, for example, must normally provide goods and services on a uniform basis or on a basis that is supported by the majority of citizens. That leaves niche opportunities for nonprofits to supply needs that differ from the norm. The explanation, however, is plainly too narrow. It consigns nonprofits to niches where neither for-profits nor governments can succeed. It is quite clear that the nonprofit sector extends well beyond that limited field. Apart from that, the argument offers no justification for a liability reduction even within its ostensible field. No liability subsidy is required because there is no need to encourage entry into a supposedly open niche. Further, the introduction of a liability reduction is a "government" action. To the extent that action increases the general level of risk, the government is injuring its own citizens.[88] That is profoundly inconsistent with the conventional role of government in protecting the property and bodily integrity of all citizens.

Sociological arguments are somewhat more amorphous.[89] The main general argument is that nonprofits are ideal structures for the production of social capital:

> Social capital is highly intangible: It exists in the relationships among people. It is the warmth and trust Tocqueville described, the bonds of trust and goodwill that are

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Models Help Explain Charitable Gifts and Organizations?" [2000] Wis. L. Rev. 1.

[86] J. Douglas, "Political Theories of Nonprofit Organization," c. 3 in Powell, *supra* note 78 (reproduced as c. 18 in J. Ott, ed., *The Nature of the Nonprofit Sector* (Oxford: Westview Press, 2001)); Knauer, *supra* note 15; Crimm, *supra* note 78.

[87] *Ibid*.

[88] That suggests that uncompensated victims of nonprofit volunteer negligence might possibly recover their losses from the government on standard principles of vicarious liability. A liability exemption for volunteers amounts to a governmental contribution to the probability that losses will be caused by nonprofit volunteers.

[89] See Part 7 (Social and Community Theories of the Nonprofit Sector) in Ott, *supra* note 86; P. Dimaggio, "Nonprofit Organizations in the Production and Distribution of Culture," c. 12 in Powell, *supra* note 78; D. Reiser, "Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits" (2003) 82 Or. L. Rev. 829. Consider M. Minow, "Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious" (2000) 80 B.U.L. Rev. 1061.

> created among community members while they work together to accomplish purposes they care about as individuals, and the by-product of their side activities – their conversations and sharing of joys and concerns. Social capital decreases transaction costs and thereby facilitates getting tasks done easily, comfortably, and with mutual trust. When there is social capital, there is no need to rely on formal contracts, written agreements, rigid rules, inflexible policies, or bureaucratic controls.[90]

Social capital of this kind is useful, but no more useful than the social capital created by the formal instruments and channels we have constructed to secure cooperation and reliance generally. Apart from that, there is no positive social capital developed by the infliction of injury and the irresponsibility of immunity. Other sociological ideas are that nonprofit organizations are crucibles for altruism, leadership development, culture and democratic engagement.[91] The argument is that production of these "goods" is inherently beneficial to the community and ought to be supported by community subsidy. That social benefit, however, is too vague and remote to justify a fundamental liability concession. It is one thing for an organization to enjoy a tax exemption. It is quite another for a government to defeat legitimate claims and, coincidentally raise the general level of risk, in a conflicted effort ostensibly to foster the elusive virtues of trust or engagement.

Conclusion

Nonprofit organizations are quick to forecast the collapse of programs, services, and themselves if their requests for support or concessions are not met. That tactic is designed to play on the widespread favourable perception of nonprofit activity and volunteer service – where "nonprofit" is equated in the public mind with charity, and "volunteer" with sacrifice. In that respect, the nonprofit sector understands quite well the source of its ability to capture political and economic resources. It nurtures, then exploits, the halo. Nurturing involves continuous reference to the scope and importance of nonprofit endeavors and the exceptional sacrifice of volunteer service. Private benefit nonprofits are either ignored, or portrayed as public-regarding in some way. Once established, the halo is then exploited for nonprofit gain, as and when required, through threats of withdrawal and contraction. There is no real surprise in any of this. The threat of departure or disengagement is a common tactic. Organizations have institutional imperatives and individual appetites to satisfy, and nonprofits employ the tools that are available to them. The halo is their unique, and powerful, instrument.

The power of the halo is evident in the immunity developments of

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[90] Ott, *ibid*. at 234-35.

[91] See Atkinson, *supra* note 80 and the commentaries in note 89 *supra*.

the past few decades. The successful campaigns in the United States and Canada starkly illustrate the approach. Immunity has been secured with a single argument that is wholly dependent on the social freight of the nonprofit/volunteer construct: *Nonprofit undertakings are worthy. They are threatened by the withdrawal of volunteer support because volunteers are fearful of liability. That fear will be overcome by immunity*. It was of no consequence to the various legislatures, apparently, that there was no empirical basis for the argument. More importantly, there was no credible legislative effort to address the conventional function of negligence liability. The few references to responsibility were laconic sophistic statements of the need to balance *liability* with the *fear of liability*. The immunity passed into law in most every case with little debate and apparently little appreciation of incentives and consequences.[92] The Saskatchewan process was particularly disconcerting. The immunity claim succeeded spectacularly. The scope of immunity was extended to gross negligence and wilful acts. Yet the Saskatchewan attempt at justification most clearly exposes the infirmity of the immunity claim. The report of the Saskatchewan Law Reform Commission avoided engaging conventional policy. The commission accepted the importance of the nonprofit sector and volunteer fears of liability and moved directly to a grant of immunity. It was a textbook example of exploiting the halo. It is of particular interest that the commission "sold" the immunity on "volunteer" considerations, and then reneged on that analytical premise. It used the power of the halo preferentially to propose immunity for only the elite classes of officers and directors. The analysis in the report overall is uninformed and unbalanced, and it would not be surprising if political influence had guided the preparation of the report. The Saskatchewan legislation, in any event, is anomalous. Most other jurisdictions that have legislated volunteer immunity extend it to all volunteers, but only for ordinary negligence. Even that, however, has not been justified with coherent analysis. No one has established that "nonprofit" and "volunteer," separately or in combination, constitute a satisfactory foundation for immunity from conventional responsibility.

Two other factors have contributed to the success of the immunity movement. One is that tort victims, as a group, are easy prey.[93]

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[92] For another illustration of the lack of debate on nonprofit privileges, see Kielbowicz & Lawson, *supra* note 6.

[93] See also the observations of Popper, *supra* note 1, at 133-34 ("Assuming for a moment that tort immunity for volunteers will increase the population of those willing to serve, it is important to consider the individuals most affected by this law: those served by volunteers. They are victims of disasters, students assisted in public and private schools, children receiving day care or engaged in organized athletics, patients in hospice care, clients requiring counsel through charitably funded legal services programs, and countless

Prospective victims do not self-identify and therefore tend not to be politically organized. Although each one of us is potentially a victim of negligence, we seem unable to appreciate our own vulnerability, at least sufficiently, or in sufficient numbers, to effectively challenge or resist immunity proposals. The second factor is that politicians are predisposed to satisfying the political demands of nonprofits. They want to be seen as supportive – so as to draw upon the warmth of the halo. They also enjoy other specific and general benefits, both personal and political, from supporting nonprofit organizations. It is also of significance that politicians commonly serve as nonprofit directors.

Together these factors have made the immunity claim feasible, indeed, almost inevitable. That is unfortunate. Immunity privileges will divide us. The nonprofit sector will become dangerous, indifferent and arrogant. Our legislatures can do better. They should reject the immunity grab. They should confirm our duty of care – our limited responsibility to have regard to the welfare of those who may be affected by our actions, particularly the vulnerable recipients of nonprofit services. If legislatures wish to do more, they might sponsor public insurance regimes. That is an appropriate solution.[94] The nonprofit sector, for its part, should stop feeding the liability fear. That will go some way towards addressing any recruitment difficulties it is supposedly experiencing.

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others in need of the help, compassion, and diverse skills that volunteers can provide. This is a highly vulnerable group, legally unsophisticated, often powerless to select the person who will assist them, and sometimes unable to discern inappropriate behavior. Unfortunately, the process by which the law was enacted took no account of the risks associated with volunteer service when the recipient is powerless. It is worth asking why in this situation, involving those least able to bargain in the marketplace for assistance, Congress would eliminate the incentives of volunteers to act with due care.").

[94] That solution is suitable across the board, covering all tort injuries caused by corporate actors, whether in the business or nonprofit sector. Variations of that solution have been part of the discussion of nonprofit volunteer immunity from an early date. See (Note), *supra* note 1; Kahn, *supra* note 7 and the *VPA* option described in note 50 *supra*.