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Torts: Another Citadel Crumbles — Ohio Abolishes the Doctrine of Charitable Immunity

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CASENOTES

TORTS: ANOTHER CITADEL CRUMBLES—OHIO ABOLISHES THE DOCTRINE OF CHARITABLE IMMUNITY—*Albritton v. Neighborhood Centers Association for Child Development*, 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

*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.**

I. INTRODUCTION

Within the past two years, the Ohio Supreme Court has begun a crusade against immunity as a viable defense. The assault began with *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*,[1] wherein the supreme court repudiated the 200-year-old doctrine of sovereign immunity[2] by announcing that "[i]f municipalities are to expose people and their property to negligent acts, then they must expect to respond to suit."[3] In the wake of the *Enghauser* decision, it is not surprising

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* President of Georgetown College v. Hughes, 130 F.2d 810, 813 (D.C. Cir. 1942) (Rutledge, J.) (emphasis added).

1. 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983). Enghauser sued the city of Lebanon, Ohio, alleging that the city's negligent construction of a bridge and roadway caused Enghauser's property to be flooded. The Ohio Court of Appeals for the Twelfth District sustained the trial court's reversal of a verdict for the plaintiff, holding that the city was protected by sovereign immunity. *Id.* at 32, 451 N.E.2d at 230. The Ohio Supreme Court subsequently reversed the court of appeals' decision and reinstated the original verdict. *Id.* at 36, 451 N.E.2d at 233.

2. The doctrine of sovereign immunity was, in actuality, judicially abrogated in Haverlack v. Portage Homes, Inc., 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982). The *Haverlack* opinion, however, was unclear as to whether the abolition was limited specifically to the facts of that case, or applicable to all municipalities. The *Enghauser* decision was, therefore, a clarification of the *Haverlack* decision.

The Ohio General Assembly has subsequently reinstated, in a limited form, the doctrine of sovereign immunity. H. 176, which was signed into law on November 20, 1985, provides blanket immunity for municipalities from suits arising from the performance of governmental functions. *See* Act of November 20, 1985, 58 OHIO ST. B.A. REP. 1907 (1985) (to be codified in scattered sections of chs. 1, 3, 5, 7, 33, 47, and 55 OHIO REV. CODE ANN.). *See also* Dayton Journal Herald, Nov. 21, 1985, at 3, col. 2; *Agreement Reached on Sovereign Immunity Proposal*, Gongwer News Service, Inc., Ohio Report, Nov. 13, 1985, at 1-2. Although local governments and governmental agencies will still be exposed to liability arising from the performance of propreitary functions, a $250,000 limitation is placed on awards for claims of pain and suffering. *Legis-letter*, 58 OHIO ST. B.A. REP. 1906, 1906 (1985).

3. *Enghauser*, 6 Ohio St. 3d at 35, 451 N.E.2d at 232.

that the Ohio Supreme Court soon broke through another antiquated barrier—the doctrine of charitable immunity.[4]

It is apparent that the court is attempting to abolish legal anachronisms and propel immunity doctrines into the twentieth century, for just one year following the demise of sovereign immunity, the Ohio Supreme Court attacked charitable immunity. In *Albritton v. Neighborhood Centers Association for Child Development*,[5] the court extended the *Enghauser* rationale to charitable organizations,[6] thereby abolishing the doctrine of charitable immunity.[7] Accordingly, charitable institutions are now subject to tort liability, just as is any corporation or individual.

This note will trace the doctrine of charitable immunity in Ohio from its inception to its recent demise, via the *Albritton* decision. In addition, this note will consider the justifications for the immunity, as well as the arguments in favor of abolition.

II. FACTS AND HOLDING

The appellant, Alfreda Albritton, brought suit against Neighborhood Centers Association for Child Development (NCA) in 1981[8] after her daughter was injured[9] at a day care center operated by the defendant. NCA, a nonprofit organization, contended that it was immune from civil liability under the doctrine of charitable immunity.[10] NCA moved for, and was granted summary judgment, after which Albritton moved for relief from judgment pending submission of further pleadings.[11] Albritton's motion was granted, whereupon NCA again moved for summary judgment on the ground that the doctrine of charitable immunity protected it from liability for the injury to Albritton's daugh-

4. *See* Albritton v. Neighborhood Centers Ass'n for Child Dev., 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984). This casenote is an analysis of the *Albritton* decision. For a synopsis of the facts and holding of the *Albritton* decision, see *infra* notes 8–14 and accompanying text.

5. 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

6. *Id.* at 214, 466 N.E.2d at 871.

7. *Id.*

8. Another defendant, The Eleanor B. Rainey Memorial Institute, Inc., was dismissed in 1982 pursuant to entering into a covenant not to sue with the plaintiff. The Institute, like NCA, was a nonprofit organization, and housed the day care center where the injury to Albritton's daughter occurred. *Id.* at 210, 466 N.E.2d at 867.

9. Albritton's five year old daughter was injured when a partition fell on her foot, fracturing the child's bone. Albritton v. Neighborhood Centers Ass'n for Child Dev., No. 45375, slip op. at 1 (Ohio Ct. App., 8th Dist. May 12, 1983) (on file with University of Dayton Law Review).

10. *Albritton*, 12 Ohio St. 3d at 210, 466 N.E.2d at 867.

11. *Id.* Albritton, in opposition to NCA's motion for summary judgment, alleged that NCA was a quasi-governmental organization rather than a charity and, therefore, was subject to liability under the *Enghauser* ruling abolishing sovereign immunity. *Id.* at 211, 466 N.E.2d at 869. Albritton, however, failed to present any specific evidence to disprove NCA's charitable status. *Id.* NCA, on the other hand, presented proof that it was a nonprofit organization. *Id.*

ter.[12] The trial court's second grant of NCA's motion for summary judgment was sustained by the Ohio Court of Appeals for the Eighth District.[13]

In a five to two decision, the Ohio Supreme Court reversed the lower court's decision, holding that a corporation, merely because it is organized for charitable purposes, is not immune from liability for its tortious conduct.[14] Thus, the Ohio Supreme Court abolished the doctrine of charitable immunity.

III. BACKGROUND

A. The Development of the Doctrine of Charitable Immunity

1. The Rise of the Immunity

The American doctrine of charitable immunity, established in *McDonald v. Massachusetts General Hospital*,[15] balances precariously upon mere dicta contained in two English cases.[16] This dicta stated that using trust funds to satisfy tort damages violates both the purpose of the trust and the charitable donor's intent and, consequently, should not be permitted.[17] Subsequently, this rationale was adopted in a third English case, *Holliday v. St. Leonard*,[18] which the Massachusetts Supreme Court relied upon in reaching the *McDonald* decision.[19] Thus, absolute immunity for charitable institutions stumbled into American common law. It is important to note, however, that *Holliday* and another of the English cases, which form the foundation for the American doctrine of charitable immunity, were overruled[20] several years prior to the *McDonald* decision.

The Massachusetts Supreme Judicial Court apparently acted with-

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12. *Id.* at 210, 466 N.E.2d at 868.

13. *Id.*

14. *Id.* at 214, 466 N.E.2d at 871. Justice William B. Brown authored the majority opinion, in which Chief Justice Frank D. Celebrezze, and Justices William A. Sweeney, Clifford F. Brown and James P. Celebrezze concurred. Dissenting opinions were issued by Justices Ralph S. Locher and Robert E. Holmes.

15. 120 Mass. 432 (1876).

16. Feofees of Heriot's Hosp. v. Ross, 12 Clark & Fin. 507, 8 Eng. Rep. 1508 (1846); Duncan v. Findlater, 6 Clark & Fin. 894, 7 Eng. Rep. 934 (1839).

17. *Ross*, 12 Clark & Fin. at 513, 8 Eng. Rep. at 1510. It is interesting that neither *Duncan* nor *Ross* dealt with personal injuries resulting from the operation of a charity. In *Ross*, the action was one for wrongful exclusion from a hospital. *Id.* at 507, 8 Eng. Rep. at 1508. *Duncan* held only that highway trustees were not liable for the negligence of persons not under their command. 6 Clark & Fin. at 894, 7 Eng. Rep. at 934.

18. 11 C.B. 192, 142 Eng. Rep. 769 (1861).

19. *McDonald*, 120 Mass. at 436.

20. *Holliday*, which was relied upon in the *McDonald* decision, was overruled by Foreman v. Mayor of Canterbury, 6 L.R.-Q.B. 214 (1871). *Duncan* was overruled by Mersey Docks Trustees v. Gibbs, L.R. 1 H.L. 93 (1866).

out the knowledge that *Holliday* had been overruled.[21] Nevertheless, if one considers the doctrine's "early reversal, and its acceptance in this country in disregard or ignorance of that fact, the historical foundation crumbles. The fault in the foundation accounts in part for the weakness later disclosed in the structure erected on it."[22] Inadequacies in the foundation of any legal doctrine naturally lead to misapplications of, exceptions to, and dissatisfaction with the general rule. Such has been the case with the doctrine of charitable immunity.

2. The Decline of the Immunity

The first major criticism of the doctrine of charitable immunity appeared in *President of Georgetown College v. Hughes*,[23] wherein Justice Rutledge attacked each of the arguments supporting the charitable immunity doctrine.[24] This highly acclaimed opinion is regarded as the beginning of the demise of charitable immunity.[25] Recognizing the validity of Justice Rutledge's criticisms, courts and scholars alike began scrutinizing not only the immunity's tenuous foundation, but also its alleged justifications.[26] But even prior to the *Hughes* decision, the immunity was slowly being eliminated as courts, in a step-by-step process, created exceptions to the "rule"[27] of absolute immunity for charitable organizations. Such was the case in Ohio.

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21. *See* President of Georgetown College v. Hughes, 130 F.2d 810, 816 (D.C. Cir. 1942). The *Hughes* court criticized the *McDonald* court, stating: "Apparently [the court] acted in ignorance of the English reversal. In any event, they resurrected in America a rule already dead in England, and thereby gave [the] dictum a new lease on life in the New World." *Id.*

22. *Id.* at 817.

23. 130 F.2d 810 (D.C. Cir. 1942). In *Hughes*, the plaintiff-nurse was struck and injured by a swinging door pushed open by a student nurse. *Id.* at 811. The court of appeals, in affirming a lower court decision for the plaintiff, held the defendant-hospital liable for the negligence of its employee. *Id.* at 827–28. Justice Rutledge, who authored the *Hughes* opinion, later became a United States Supreme Court Justice and served from 1943–49. M. SHAPIRO & R. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 772–73 (6th ed. 1983).

24. *Hughes*, 130 F.2d at 822–25. For a discussion of the justifications for the doctrine of charitable immunity and those considerations that mitigate against its continued recognition, see *infra* notes 55–96 and accompanying text.

25. "Prior to 1942 only two or three courts had rejected the immunity of charities outright. In that year a devastating opinion of Judge Rutledge . . . reviewed all of the arguments in favor of the immunity, and demolished them so completely as to change the whole course of the law." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 133, at 996 (4th ed. 1971) (footnote omitted).

26. *See, e.g.*, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965); Fisch, *Charitable Liability for Tort*, 10 VILL. L. REV. 71 (1964).

27. The "rule" of charitable immunity is not actually a rule, but is instead an exception to the general rule of liability for one's tortious conduct. Therefore, the courts created exceptions to the exception. *See Hughes*, 130 F.2d at 817.

B. Charitable Immunity in Ohio

The doctrine of charitable immunity was established in Ohio in the 1911 decision of *Taylor v. Protestant Hospital Association*.[28] In *Taylor*, the Ohio Supreme Court refused to hold a nonprofit hospital liable for injuries to a patient which resulted from the negligence of one of its employees.[29] The *Taylor* court's stance of providing absolute immunity for hospitals did not, however, endure. In 1922, the Ohio Supreme Court held that a nonprofit hospital was not immune from liability for tortious conduct if it failed to use reasonable care in selecting its employees.[30] Consequently, just eleven years after the doctrine of charitable immunity was recognized in Ohio, the first exception was formulated. Other exceptions soon followed, so that immunity was denied: (1) if the injured party was not a "beneficiary" of the institution;[31] (2) if the charity operated an income-producing enterprise not directly related to the purpose for which the institution was organized;[32] or (3) if the injured party paid for the services rendered by the charity.[33] Finally, the Ohio Supreme Court decided that nonprofit hospitals were entitled to no immunity whatsoever in *Avellone v. St. John's Hospital*.[34] Thus, the court succeeded in gradually dissolving the rule of

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28. 85 Ohio St. 90, 96 N.E. 1089 (1911). In *Taylor*, the plaintiff alleged that his wife had died due to an employee-nurse's negligence in counting surgical sponges. *Id.* at 91, 96 N.E. at 1089. The hospital contended it was immune from liability because it was a charitable institution. *Id.* at 91–92, 96 N.E. at 1090.

29. *Id.* at 103, 96 N.E. at 1092. In 1938, charitable immunity was subsequently extended to all charities. Waddell v. YMCA, 133 Ohio St. 601, 15 N.E.2d 140 (1938).

30. Taylor v. Flower Deaconess Home & Hosp., 104 Ohio St. 61, 74, 135 N.E. 287, 291 (1922). Although immunity was extended to all charities, 16 years after *Flower*, in the 1938 *Waddell* decision, the immunity was limited to that enjoyed by charitable hospitals because reasonable care had to be exercised before immunity was granted. *Waddell*, 133 Ohio St. at 606, 15 N.E.2d at 143.

31. Sisters of Charity v. Duvelius, 123 Ohio St. 52, 173 N.E. 737 (1930). Charitable institutions were held liable to "strangers" to the organization just as any other corporation would be. *Id.* at 61, 173 N.E. at 740. Obviously, there was great difficulty distinguishing between a "beneficiary" and a "stranger." A "stranger" was generally considered to be one who received no direct benefit from the hospital, such as a person visiting a patient or an employee. *See* Lipson, *Charitable Immunity: The Plague of Modern Tort Concepts*, 7 CLEVE.-MAR. L. REV. 483, 492 (1958).

32. Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960) (bingo game).

33. Bell v. Salvation Army, 172 Ohio St. 326, 175 N.E.2d 738 (1961). In *Bell*, the plaintiff paid for lodging at the Salvation Army. *Id.* at 326, 175 N.E.2d at 739. It should be noted that if a charity receives compensation for the services it provides, it is still considered a charity and qualifies for immunity so long as such payments are used for charitable purposes and are not for profit. W. PROSSER, *supra* note 25, § 133, at 992.

34. 165 Ohio St. 467, 135 N.E.2d 410 (1956). In reaching its decision, the *Avellone* court considered various so-called "public policy" justifications for the immunity, but rejected them, stating: "Whatever the reason for the public policy that gave rise to the rule of immunity, public policy today, examined in the light of present day conditions, will not support such a rule." *Id.* at 476, 135 N.E.2d at 416.

charitable immunity on an ad hoc basis.

This gradual dissolution ended, however, with *Gibbon v. YWCA*,[35] wherein the Ohio Supreme Court refused to extend the *Avellone* complete liability principle to any charities other than hospitals.[36] Hence, although the Ohio Supreme Court denied absolute immunity to charities in some situations, the court remained unwilling to deny immunity in all situations.

The Ohio Supreme Court's fluctuations as to when, and which, charities would be granted immunity placed the doctrine in a state of chaos, necessitating further judicial review of the doctrine of charitable immunity. *Albritton v. Neighborhood Centers Association for Child Development*[37] became the instrument for this review.

IV. ANALYSIS

A. *Abolition of the Doctrine of Charitable Immunity*

In *Albritton v. Neighborhood Centers Association for Child Development*,[38] the Ohio Supreme Court examined and abolished the doctrine of charitable immunity, concluding that the doctrine "is not an ironclad, sacrosanct rule but has been severely limited in its actual application."[39] The *Albritton* court, therefore, found no compelling precedential or public policy reasons to sustain charitable immunity.[40] The court also held there was no merit to the Neighborhood Centers Association's (NCA) contention that the court should defer to the Ohio General Assembly for abolition of the doctrine of charitable immunity.[41] According to the court, because the doctrine was judicially created, the courts, rather than the Ohio General Assembly, had the power and duty to examine it.[42] If such examination should reveal that the doc-

35. 170 Ohio St. 280, 164 N.E.2d 563 (1960).

36. As the Ohio Supreme Court observed in retrospect, "In the Avellone case . . . the court felt that changed modern operating conditions of nonprofit hospitals required it to reject and abandon the previously declared public policy. Similarly compelling reasons are not established to the satisfaction of the majority in this case . . . ." *Id.* at 293, 164 N.E.2d at 572. The *Gibbon* court relied heavily upon *stare decisis* considerations "if for no other reason, [than] to avoid retroactive imposition of liability on a charitable institution which would result from the declaration of a different public policy." *Id.* at 280, 164 N.E.2d at 564 (court syllabus).

37. 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

38. 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

39. *Id.* at 212, 466 N.E.2d at 870.

40. *See id.* at 210, 466 N.E.2d at 867.

41. *Id.* at 214, 466 N.E.2d at 871.

42. *Id.* The court stated that it should review such judicially created doctrines in light of reason, changes in public policy, and the functions of the organization involved. *Id.* (citing Enghauser Mfg. Co. v. Eriksson Eng'g. Ltd., 6 Ohio St. 3d 31, 33, 451 N.E.2d 228, 230 (1983)). Furthermore, in deciding cases such as the one at bar, the court noted that a balancing of rights is involved. A charitable organization's rights to receive any possible advantages and assistance

trine is no longer practical or equitable, the judiciary should make the necessary corrections.[43] Finally, the Ohio Supreme Court reviewed pre-existing public policy regarding the necessity of charitable immunity. In the early twentieth century, social attitudes and mores were protective of charitable institutions.[44] Public policy, therefore, dictated that because charities were organized with the intent to benefit society, nothing, including tort liability, should interfere with this philanthropic goal.[45]

The *Albritton* court rejected the public policy theory, advancing four reasons for doing so. First, an injury is no less painful or costly simply because it is inflicted by a charitable institution rather than a noncharitable one.[46] Second, when no compensation is received for an injury inflicted through "charitable" negligence, the victim or his family often becomes dependent upon other charitable or governmental institutions.[47] Third, granting charities immunity from their negligence essentially forces the uncompensated victim to make an unwilling contribution to that charity.[48] Finally, the dissenting argument that liability will discourage volunteerism and contributions, thereby enabling only the large charities to survive,[49] was dismissed by the *Albritton* court which noted that these concerns have not materialized in those jurisdictions which have abolished the doctrine.[50] Based on these reasons, the Ohio Supreme Court concluded that the doctrine of charitable immunity would no longer be a viable defense in Ohio.

The *Albritton* dissent,[51] however, thought that the majority took an overbroad position by abolishing the charitable immunity defense for all charitable organizations.[52] Justice Locher, in his dissenting opin-

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must be weighed, according to the court, against an individual's right to receive compensation for injuries caused by another's negligence. *Albritton*, 12 Ohio St. 3d at 213, 466 N.E.2d at 870.

43. *Albritton*, 12 Ohio St. 3d at 214, 466 N.E.2d at 871.

44. *See infra* notes 78–81 and accompanying text.

45. *See Albritton*, 12 Ohio St. 3d at 213, 466 N.E.2d at 870.

46. *Albritton*, 12 Ohio St. 3d at 213, 466 N.E.2d at 870. The court noted that it is ironic that an institution organized to aid the public should be relieved of compensating those injured by such aid. *Id.*

47. *Id.*

48. *Id.* In reality, injured victims are contributing an amount equal to that which they would have received had they been injured by a noncharitable corporation. *Id.*

49. *Id.* at 216, 466 N.E.2d at 873 (Locher, J., dissenting). For a complete discussion of Justices Holmes' and Locher's dissents, see *infra* notes 51–54.

50. *Albritton*, 12 Ohio St. 3d at 214, 466 N.E.2d at 871.

51. Although Justice Locher concurred with Justice Holmes' dissenting opinion, Justice Locher also offered his own separate dissenting opinion. *See id.* at 215, 466 N.E.2d at 872. It is interesting to note that these two justices also dissented in Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 37, 451 N.E.2d 228, 233 (1983). As indicated previously, the *Enghauser* case abolished the doctrine of sovereign immunity. *See supra* notes 1–3 and accompanying text.

52. *Albritton*, 12 Ohio St. 3d at 215, 466 N.E.2d at 872 (Locher J., dissenting).

ion, maintained that the court should have retained its case-by-case method[53] of dealing with the immunity. Had this been done, NCA would still have been found liable, yet all Ohio charities would not have been affected.[54]

Although the dissent raised valid arguments, the majority opinion was soundly reasoned. Nevertheless, the majority invoked only a few justifications for the abolition of charitable immunity. In so doing, numerous other policy factors which are equally relevant and which could have provided further support for the court's holding were ignored.

B. Denouncing Charitable Immunity—The "Other" Policy Factors

1. The Four Theoretical Bases for the Immunity

Before examining the justifications for the abolition of charitable immunity, the basis of the immunity must be explored. Proponents of charitable immunity have generally relied upon four theories[55] to support their positions, ordinarily utilizing some combination of the theories, rather than relying on any single one.

The trust fund theory is the oldest of the four theories, and is considered the fundamental basis of the charitable immunity doctrine.[56] This theory asserts that charitable funds comprise a trust which is to be administered for the charity's beneficiaries.[57] Accordingly, satisfying tort claims from the trust fund would so deplete the trust that it would become difficult, if not impossible, to conduct the charity as originally intended.[58] As an additional justification, advocates of this theory insist that using trust funds to satisfy tort claims serves to defeat the original gratuitous intent for which donations were given.[59]

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53. The case-by-case method of applying the charitable immunity doctrine, according to Justice Locher, recognizes that all charities are not the same because they differ in size, funding, and the types of services provided. *Id.* at 215, 466 N.E.2d at 872 (Locher J., dissenting).

54. *Id.* at 217, 466 N.E.2d at 873 (Locher, J., dissenting). NCA is a government-funded charity. The dissent argued that if the majority had retained its case-by-case analysis, the result would have been liability only for government-funded charities as opposed to all charities. *Id.*

55. *See infra* notes 56–76 and accompanying text. Various courts and commentators have recognized these four theories as the major theories supporting the doctrine of charitable immunity. *See, e.g.*, President of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942); Horty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases*, 25 OHIO ST. L.J. 343, 344–45 (1964); Lipson, *supra* note 31, at 484–85, 488–90; Comment, *Charitable Immunity: A Diminishing Doctrine*, 23 WASH. & LEE L. REV. 109, 113–14 (1966); Annot., 25 A.L.R. 4TH 517, 522–23 (1983).

56. This theory was relied upon in McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876), the case which introduced the theory of charitable immunity into American common law. *See supra* notes 15–22 and accompanying text.

57. *See Hughes*, 130 F.2d at 823, 825; Horty, *supra* note 55, at 344; Lipson, *supra* note 31, at 484–85.

58. Horty, *supra* note 55, at 344.

59. *See Hughes*, 130 F.2d at 825; Horty, *supra* note 55, at 344; Lipson, *supra* note 31, at

The trust fund theory might be plausible if it were strictly adhered to so that all persons are barred from recovering against a charity. Instead, the trust fund theory has been applied inconsistently. Strangers have been allowed compensation for injuries inflicted upon them by a charity while beneficiaries have been denied compensation for the same injuries.[60] Selective application of the theory does little to protect a charity's trust funds. They are still depleted, regardless of who is compensated. Moreover, people do not ordinarily donate to a charity with the specification that the donation be exempt from tort claims.[61] Consequently, there is little foundation for the claim that the theoretical "donor's intent" is violated by allowing tort recovery, especially to beneficiaries.[62] Finally, critics of the trust fund theory indicate that charities have not suffered, nor have donations decreased, in those states which retain no immunity.[63]

The second theory, which responds to the imposition of liability under the doctrine of respondeat superior, contends that vicarious liability is inapplicable to charitable organizations.[64] Under the doctrine of respondeat superior, employers are liable for those torts committed by their employees while within the scope of their employment.[65] The imposition of liability on employers is considered a quid pro quo for the benefits they receive from their employees.[66] Naturally, claims against charities arise out of the misfeasance or nonfeasance of their employ-

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484–85. Donors supposedly do not intend that their funds be used to satisfy tort claims. As stated by the *McDonald* court:

> The [charitable organization] has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the [charity] and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses.
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> . . . The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them.

McDonald, 120 Mass. at 435–36.

60. Lipson, *supra* note 31, at 485. For an explanation of the stranger-beneficiary distinction, see *supra* note 31.

61. Lipson, *supra* note 31, at 485.

62. *Hughes*, 130 F.2d at 822–23. Justice Rutledge carried this proposition even further: "If the matter is regarded as 'diverting the fund to persons not within the class intended for aid,' it is impossible to assume that the donor intends everyone except the special object of his bounty to have reparation. If any assumption were justified, it would be exactly the contrary one." *Id.* at 825–26.

63. *See, e.g.*, *Albritton*, 12 Ohio St. 3d at 214, 466 N.E.2d at 871; Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 503, 208 A.2d 193, 201 (1965). The late Dean Prosser stated, "There is not the slightest indication that donations have been in any way discouraged, or charities crippled in states which deny all immunity." W. PROSSER, *supra* note 25, § 133, at 994.

64. *See, e.g.*, Comment, *supra* note 55, at 114.

65. H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 52, at 101 (1979).

66. *Id.*

ees. This theory purports, however, that because charities are nonprofit organizations and derive no benefit from their employees, the doctrine of respondeat superior is inapplicable.[67]

The weakness in such an analysis of respondeat superior is that courts which embrace the analysis interpret the principles behind vicarious liability too narrowly. Respondeat superior does not depend so much upon whether employers benefit from their employees' services, but rather upon the degree of control they have over their employees.[68] Certainly a charitable organization exercises control over its employees, regardless of whether they are volunteers. Hence, the doctrine of respondeat superior should be applicable to charitable institutions, just as it is to any other employer. Advocates who contend otherwise demonstrate an artificially narrow, if not wholly incorrect, understanding of respondeat superior.

The third theory, the implied waiver or assumption of risk theory, proposes that beneficiaries,[69] upon entering a charitable institution, waive any right to recover for injuries inflicted while at the institution.[70] Therefore, because beneficiaries seek the benefits of a charitable institution, they supposedly assume the risk of injury.[71]

This theory fails when the elements of assumption of risk are considered. To assume a risk, a person must know of that risk, understand the danger presented from it, and yet voluntarily expose himself or herself to that risk.[72] Persons entering charitable institutions do not usually fall within the purview of these requirements. Consider, for example, a severely injured or unconscious person, an infant in a day care center, or an indigent with no alternative but to seek charitable assistance.[73] None of these persons can intelligently, knowingly, or volunta-

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67. Horty, *supra* note 55, at 345; Comment, *supra* note 55, at 114.

68. H. REUSCHLEIN & W. GREGORY, *supra* note 65, § 5, at 11; Lipson, *supra* note 31, at 486.

69. This theory applies solely to situations where a beneficiary is involved. Lipson, *supra* note 31, at 486.

70. *See Hughes*, 130 F.2d at 826; Lipson, *supra* note 31, at 488; Comment, *supra* note 55, at 113–14. Proponents of this theory equate implied waiver with assumption of risk. That is, for purposes of the implied waiver or assumption of risk theory, no legal distinction is made between the two theories. The Arizona Supreme Court explained the lack of legal distinction between the theories of implied waiver and assumption of risk by stating that "when one enters a [charitable institution] . . . he by accepting the services rendered him, waives all right to claim damages for injuries suffered as a result of the negligence of the [charity] or its employees. In other words he assumes the risk of negligence." Ray v. Tucson Medical Center, 72 Ariz. 22, 27, 230 P.2d 220, 223 (1951).

71. *See Hughes*, 130 F.2d at 826; Lipson, *supra* note 31, at 488; Comment, *supra* note 55, at 113–14.

72. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 487 (5th ed. 1984).

73. *See Hughes*, 130 F.2d at 826 (noting that infants, insane persons, and injured, although

rily assume any risks or waive any rights. Thus, because the assumption of risk requirements cannot be satisfied in most, if not all, charitable tort situations, the implied waiver or assumption of risk theory is inapplicable.[74]

Finally, the public policy theory, broadly stated, forbids imposition of charitable liability because the beneficial effects of a charitable organization purportedly outweigh the detrimental effects of uncompensated injuries to individuals.[75] The Ohio Supreme Court ultimately adopted this theory as the justification for the doctrine of charitable immunity.[76] Because the public policy theory is the most controversial of the four theories, it has spawned some of the best arguments for the abolition of the charitable immunity doctrine.

2. Public Policy Now Favors the Abolition of Charitable Immunity

With the change in time comes changes in social norms and mores and, as a result, previously acceptable public policy often becomes outmoded or invalid. Accordingly, the policy, as well as the laws upholding that policy, must be tempered to reflect the times. Such has been the case with charitable immunity. The *Albritton* court recognized this need for reform, but failed to recognize the social and legal changes which have negated the public policy justifications that previously supported the doctrine of charitable immunity.

Quite simply, the conditions which formerly prompted immunity for charities no longer exist in today's society.[77] At the turn of the century, when charitable immunity became part of American common law,[78] charities were perceived as struggling, small-time operations.[79]

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conscious, adults are unable to assume the risk of injury); *See also* Lipson, *supra* note 31, at 488; Comment, *supra* note 55, at 113–14.

74. Even the conscious adult seeking the benefits of a charity is not in the position to make any voluntary waivers. The average person simply does not think about whether he or she will be injured while at the charitable organization, and thus cannot willingly agree to assume a risk he or she does not know of. This approach is consistent with the requirements of assumption of risk.

75. Comment, *supra* note 55, at 114. The public policy theory is not really separate and distinct from the others. It is actually an incorporation of all or some of the other theories, when convenient, in order to grant immunity. *Id.*

76. This position was described in the *Avellone* case:

> Up to this point in the development of the law, this court has apparently felt that the benefit to society as a whole, gained by granting immunity, weighed the former right in favor of the latter, and this was on the ground that . . . immunizing them was "a valuable aid in securing the ends of justice."

Avellone v. St. John's Hosp., 165 Ohio St. 467, 473, 135 N.E.2d 410, 414 (1956).

77. *See* Lipson, *supra* note 31, at 495. *See also Hughes*, 130 F.2d at 824; Comment, *supra* note 55, at 117.

78. Charitable immunity was brought to American common law through McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876). *See supra* notes 15–22 and accompanying text.

79. It is no wonder that charities were viewed in this way. A typical defense of a charity

The funding of these early charities depended solely upon whatever donations were received. To avoid depletion of trust funds and to encourage altruistic persons to continue their admirable work, immunity from tort liability was granted.[80] This protection, however, is no longer necessary:

> The hardships and burdens of charitable organizations of the past have, to a large extent, ceased to exist. These institutions of today have, in many instances, grown into enormous businesses, handling large funds, managing and owning vast properties, much of it tax free by statute, set up by large trusts or foundations, enjoying endowments and resources beyond anything thought of when the matter of immunity was first considered. They have a capacity for absorbing loss which did not exist even a few decades ago.[81]

Not only are today's charities operated like businesses, but liability insurance has become more accessible.[82] Persons injured because of a charitable institution's negligence can now be compensated by the insurance company instead of the charity. Although purchasing liability insurance will undoubtedly deplete a charity's coffers, the expense of insurance is negligible compared to the benefit society receives when another class of tort victims is compensated.[83] Furthermore, the cost of endless litigation to debate the immunity versus liability issue will be avoided.[84] More importantly, the costs of any litigation regarding a charity's alleged negligence will be borne by the insurance company

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was stated as follows:

> [The defendant] is a corporation not for profit maintaining and operating a charitable hospital at a loss, the deficit being made up by charitable gifts; that its funds are derived from donations, gifts, bequests, and such income as it may receive from patients who are able to pay; and that there are patients who are not able to pay and are cared for by defendant as a matter of charity.

Avellone, 165 Ohio St. at 467, 135 N.E.2d at 411 (defendant St. John's Hospital's answer to complaint of plaintiff Avellone).

80. Lipson, *supra* note 31, at 491.

81. Noel v. Menninger Found., 175 Kan. 751, 758, 267 P.2d 934, 939 (1954) (Wertz, J.).

82. *See Hughes*, 130 F.2d at 823–24; *Avellone*, 165 Ohio St. at 475, 135 N.E.2d at 415; Lipson, *supra* note 31, at 495–96.

83. Other operating expenses, such as salaries, rent, and fire insurance premiums, are presently paid from the trust fund. Adding liability insurance coverage will not so significantly increase the amount paid for such items that a charity would be forced into operating at a loss. Lipson, *supra* note 31, at 495.

Justice Rutledge espoused a similar argument in *Hughes*, stating that because charities were already required to obtain liability insurance covering strangers, adding beneficiaries to the covered group would not significantly increase the charity's expenses. *Hughes*, 130 F.2d at 827–28. He further called for a balancing test in which the cost to the charity in adding such insurance to its operating overhead should be weighed against the cost to the individual in bearing a negligently inflicted injury for which he or she is not compensated. *Id.* at 824. Obviously, Justice Rutledge was of the opinion that the injured party should prevail.

84. Lipson, *supra* note 31, at 495.

rather than the charity.[85] In effect, liability insurance will protect the charity's trust funds, which could possibly result in an increased financial benefit for the charity.

Because liability insurance is now more accessible, public policy is better served when the injured individual, rather than the charity, is protected. This rationale is evidenced by the concept of loss spreading.[86] Under this concept, the victim alone no longer bears the burden resulting from another's negligence in the operation of an enterprise. Instead, the burden is shifted to the community at large and distributed amongst those who benefit from the services they receive.[87] Thus, the acceptance of loss spreading signifies a shift in society's concern from the institution—whether it be a corporation or a charity—to the individual.

The concept of spreading the loss to protect the individual is actually a reflection of the whole foundation of tort liability, which holds individuals responsible for their own wrongdoing.[88] Generally, liability is the rule and immunity, granted only in certain situations, is the exception. When the situations necessitating the immunity no longer exist, neither should the immunity. Moreover, if one considers Justice Rutledge's suggestion that it is the "tendency of immunity to foster neglect and of liability to induce care and caution,"[89] one returns full circle to the general principles of tort liability. Consequently, public policy should, as it recently has, dictate that a charitable organization be liable for its own wrongdoing.

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85. Liability insurance enables one to be compensated for injuries received from a charity's negligence. When there has been an injury at a charitable institution, which results in a claim against that institution, the insurance company has a contractual obligation to compensate the victim, if compensation is proper.

The insurance company decides whether it will satisfy the claim. If the company believes the charity was not negligent, it may decide to try the case. All costs of litigation are, however, borne by the insurance company, not the charity. *See generally* R. KEETON, INSURANCE LAW § 7.6 (1971).

86. *Hughes*, 130 F.2d at 827; Lipson, *supra* note 31, at 501.

87. *See, e.g.*, Ray v. Tucson Medical Center, 72 Ariz. 22, 36, 230 P.2d 220, 229 (1951). The *Ray* court spoke of various legislative enactments, such as workers' compensation and occupational disease disability laws, under which the burden of bearing such losses is removed from the individual and is instead placed upon the public at large. *Id.* at 36, 230 P.2d at 229. The court further explained that such legislative enactments are declarations of public policy in favor of the individual, and that the general public is made to bear the burden through the levying of taxes, either indirectly or directly, to carry out the policy. *Id.* The court finally concluded that with the advent of the loss spreading concept public policy was no longer a justification for charitable immunity. *Id. See also Hughes*, 130 F.2d at 827; Lipson, *supra* note 31, at 501.

88. *See Hughes*, 130 F.2d at 814 n.14.

89. *Id.* at 824. Justice Rutledge was probably correct. As organizations strive for avenues to avoid liability, perhaps by using more caution during the dispensing of services, the number of careless injuries will be reduced. This, in turn, will further protect the trust funds, as insurance premiums will not have to be continuously raised in order for the charity to retain coverage.

Proponents of charitable immunity believe that total abolition of the doctrine, in order to reflect the theory of tort liability, will lead to a decrease in contributions received and benefits provided.[90] These proponents believe that this decrease will, in turn, result in the eventual destruction of the charitable institution.[91] Evidence, however, fails to support such speculations.[92] Charities still thrive in those states which have eliminated the immunity.[93] Moreover, it appears that proponents of charitable immunity forget that the existence of liability insurance can counteract this concern.

It also appears that charitable immunity advocates overlook the paradox created by denying compensation to beneficiaries of charities. Beneficiaries are the most unlikely persons to be in a position to bear the consequences of an uncompensated injury. Yet, ironically, as a result of the numerous exceptions to the rule of absolute immunity, beneficiaries have consistently been denied recovery while others have been compensated.[94] Revoking charitable immunity altogether will remove this paradox and place the beneficiary in the position originally intended—benefitted, not burdened, by the charity.

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90. *Id.* at 823. *See also* Albritton v. Neighborhood Centers Ass'n for Child Dev., 12 Ohio St. 3d 210, 216, 466 N.E.2d 867, 873 (1984) (Locher, J., dissenting).

91. *See Hughes*, 130 F.2d at 823. *See also Albritton*, 12 Ohio St. 3d at 217–18, 466 N.E.2d at 873 (Locher, J., dissenting).

92. *See Albritton*, 12 Ohio St. 3d at 214, 466 N.E.2d at 871.

93. *Hughes*, 130 F.2d at 827; Lipson, *supra* note 31, at 492. *But cf.* Canon & Jaros, *The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity*, 13 LAW & SOC. REV. 969 (1970). Commentators Canon and Jaros compared the increase in hospital room rates in states which have abrogated the immunity with states which have not. This comparison led the commentators to conclude that the abrogation has resulted in a marked increase in hospital room rates. *Id.* at 969. However, the study also reports that Ohio moved from full immunity to complete abrogation in 1956, the year of the *Avellone* decision. *Id.* at 973 (Table I: Changes in the Status of the Charitable Immunity Doctrine, 1942–74). A study of the legal history of charitable immunity in Ohio shows this to be false. *See supra* notes 28–36 and accompanying text. Given this discrepancy, the Canon and Jaros report is of questionable validity. Moreover, as stated by the late Dean Prosser, there have been no significant changes regarding charities in those states which have abolished the immunity:

> [T]he argument [that the abolition of charitable immunity will result in the eventual destruction of charities] appears to have been concocted out of defense counsel's head rather than to have arisen out of any reality of experience. There is not the slightest indication that donations have been in any way discouraged, or charities crippled in states which deny all immunity.

W. PROSSER, *supra* note 25, § 133, at 994 (citation omitted). The *Albritton* dissent, however, cited the Canon and Jaros study as authority for its position. *Albritton*, 12 Ohio St. 3d at 217, 466 N.E.2d at 873–74 (Locher, J., dissenting).

94. Lipson, *supra* note 31, at 492. Those favoring the immunity say that donors' charitable intentions are thwarted if their contributions are used to satisfy tort damages. *See Hughes*, 130 F.2d at 823, 825; Horty, *supra* note 55, at 344; Lipson, *supra* note 31, at 484–85. However, donors' intentions to give aid to those who need it are also thwarted when injured parties are denied recovery for injuries sustained at the very institution to which the donors' contributions were made.

Finally, *stare decisis* must be considered. Undoubtedly, it is a well respected and valuable means of preserving our legal system.[95] *Stare decisis* is not, however, infallible. Blind adherence to any doctrine, merely in the interest of consistency, promulgates injustice. The Ohio Supreme Court addressed *stare decisis* as applied to the doctrine of sovereign immunity, and stated:

> [W]hen a rule of law is judge-made, and the reasons for its use have vanished, the court should not perpetuate it until petrification. A rule that has outlived its usefulness should be changed. Greater justification is needed for a rule of law than that it has been part of the common law for a few hundred years.[96]

The Ohio Supreme Court also recognized the inequities created by adherence to *stare decisis* when applied to the doctrine of charitable immunity.[97] Accordingly, the *Albritton* case was the conduit for change.

The Ohio Supreme Court undoubtedly made the right decision to overrule the doctrine of charitable immunity, because it is no longer defensible. Nevertheless, it is disturbing that the court relied solely upon the few reasons recited in its opinion,[98] thereby excluding other reasons[99] which equally support the immunity's rescission. Because the *Albritton* majority failed to write a more inclusive and detailed opinion as to why it abrogated the doctrine of charitable immunity, it is apparent that the dissent was not convinced that abrogation was the proper method to correct the immunity's shortcomings.

V. APPLICATION OF THE ABROGATION

Another problem, and perhaps the most serious problem with the *Albritton* decision, was the failure of the Ohio Supreme Court to specifically address the issue of retroactive versus prospective abrogation of the doctrine of charitable immunity. However, because *Albritton* was reversed and remanded,[100] the court evidently intended that the immunity's rescission be applied retroactively.[101] Technically, the *Al-*

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95. Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 34, 451 N.E.2d 228, 231 (1983).

96. *Id.*

97. *Albritton*, 12 Ohio St. 3d at 213–14, 466 N.E.2d at 870–71.

98. *See supra* text accompanying notes 46–50.

99. *See supra* notes 77–96 and accompanying text.

100. 12 Ohio St. 3d 210, 215, 466 N.E.2d 867, 871 (1984).

101. The decision in *Albritton* fails to address the application of the abrogation of the doctrine of charitable immunity. This casenote, however, takes the position that the Ohio Supreme Court intended that its decision be applied retroactively because the case was "remanded to the trial court for further proceedings." *Id.* There is legal precedent for retroactive application of the abrogation. *See, e.g.*, Jackson v. Doe, 296 So. 2d 323 (La. 1974); Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966) (retroactive application to the extent of insurance coverage); Kuncio v.

britton court may apply the abrogation of the doctrine retroactively in accordance with *Great Northern Railway v. Sunburst Oil & Refining Co.*[102] In *Great Northern Railway*, the United States Supreme Court held that the highest court of a state, when overruling a previous civil decision, may choose to apply that ruling prospectively, retroactively, or both.[103] These alternatives are available whether "the subject of the new decision is common law or statute."[104] Furthermore, when a legislative enactment affects procedural rights, as opposed to substantive rights, there is no bar to applying the law retroactively.[105] The United States Supreme Court has stated that this rule is equally applicable to a court decision overturning a common law rule,[106] as the *Albritton* decision has done to charitable immunity. Generally, a "substantive law is [one] which creates duties, rights and obligations, while [a] procedural or remedial law prescribes methods of enforcement of rights or obtaining redress."[107]

Arguably, when the *Albritton* court abolished charitable immunity it merely removed a procedural defense previously granted to charitable institutions, thereby avoiding infringement upon any substantive rights. Consequently, it may be argued that the abolition of charitable immunity could be retroactively applied without violating due process.

It is more probable, however, that the abolition of the charitable immunity defense does infringe upon substantive rights:

> "Where before a defendant was shielded from liability . . . it no longer enjoys such protection. Where before a plaintiff . . . was denied recovery, he is now . . . entitled to damages." Clearly, no modification could be more substantive than that which imposes upon one party the obligation to compensate and grants another the right to be compensated where before neither such duty nor such entitlement existed.[108]

Millard Fillmore Hosp., 91 A.D.2d 1179, 459 N.Y.S.2d 152 (1983) (order affirming propriety of retroactive application of abrogation of doctrine of charitable immunity).

102. 287 U.S. 358 (1932).

103. *Id.* at 364–65.

104. *Id.* at 365.

105. *See* Wilfong v. Batdorf, 6 Ohio St. 3d 100, 103–04, 451 N.E.2d 1185, 1188 (1983); Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 117, 387 N.E.2d 231, 233 (1979); State *ex rel.* Holdridge v. Industrial Comm'n., 11 Ohio St. 2d 175, 179, 228 N.E.2d 621, 624 (1967) (citing State *ex rel.* Slaughter v. Industrial Comm'n, 132 Ohio St. 537, 9 N.E.2d 505 (1937)).

106. Linkletter v. Walker, 381 U.S. 618, 628–29 (1965). The Supreme Court addressed whether the decision in Mapp v. Ohio, 367 U.S. 643 (1961), requiring exclusion of illegally seized evidence in state criminal trials, operated retroactively. *Linkletter*, 381 U.S. at 619–20. The Court held that it did not, but indicated that retroactive application is not prohibited by the Constitution. *Id.* at 620, 629.

107. *Holdridge*, 11 Ohio St. 2d at 178, 228 N.E.2d at 623.

108. *Wilfong*, 6 Ohio St. 3d at 106, 451 N.E.2d at 1191 (Locher, J., dissenting) (quoting Viers v. Dunlap, 1 Ohio St. 3d 173, 175, 438 N.E.2d 881, 883 (1982)). Both *Wilfong* and *Viers* concerned the abolition of contributory negligence as an affirmative defense. In *Viers*, the aboli-

The above quotation, while addressing the abolition of contributory negligence, applies equally to the abolition of charitable immunity. In the past, charitable institutions were not always obligated to compensate injured persons.[109] Now, however, charitable institutions are not shielded from liability and plaintiffs are not denied recovery. Surely, then, the abrogation of the charitable immunity defense affects substantive, rather than procedural rights. Although it is clearly within the Ohio Supreme Court's power to apply the abrogation of charitable immunity retroactively, it was unwise to do so. Instead, the *Albritton* court should have prospectively rescinded the doctrine of charitable immunity, as has been done in other jurisdictions which have abolished the immunity.[110]

The dissenting opinion in *Enghauser Manufacturing Co. v. Eriksson Engineering Ltd.*[111] advocated prospective application of the abolition of sovereign immunity. According to the dissent of Justice Holmes, if the abrogation of sovereign immunity was applied retroactively, municipalities which had previously relied upon the doctrine would be denied the "opportunity to make arrangements to meet the new liability to which they [became] subject."[112]

The *Enghauser* dissent's reasoning supporting prospective application of the doctrine of sovereign immunity is equally pertinent to the doctrine of charitable immunity. As with municipalities, liability insurance will enable charities to meet their new obligations. This cannot be accomplished, however, if charities are unable, because of either the lack of funds or time, to obtain the insurance. The financial hardships certain to befall charitable institutions which have formerly relied upon charitable immunity could have been avoided had the *Albritton* majority applied the doctrine's rescission prospectively.

Prospective application of the abrogation is further substantiated by the Ohio Constitution, which prohibits the Ohio General Assembly

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tion was held to affect substantive rights and, therefore, could not be applied retroactively. *Viers*, 1 Ohio St. 3d at 174, 438 N.E.2d at 883. *Wilfong*, however, overruled *Viers*, holding that because the abolition of contributory negligence as an affirmative defense merely affected procedural rights, it could be applied retroactively. *Wilfong*, 6 Ohio St. 3d at 103, 451 N.E.2d at 1188. It is asserted that Justice Locher more correctly characterized the abolition of contributory negligence as affecting substantive rights. Because the doctrine of charitable immunity is also a defense, it is analagous to the contributory negligence defense, and hence, the same analysis should apply.

109. *See supra* notes 28–37 and accompanying text.

110. *See supra* note 101. *See also* Annot., 25 A.L.R. 4TH 517, 523 (1983); 15 AM. JUR. 2D *Charities* § 194, at 235–36 (1964).

111. 6 Ohio St. 3d 31, 37, 451 N.E.2d 228, 233 (1983) (Holmes, J., dissenting).

112. *Id.* The *Enghauser* dissent stressed that it made little difference that liability insurance will mitigate the costs associated with the newly imposed liability, because if the abrogation were applied retroactively, municipalities would be denied the opportunity to obtain such insurance. *Id.*

from enacting retroactive laws.[113] Although the Ohio Constitution does not contain a similar provision which forbids courts from retroactively imposing decisional laws, public policy would seem to dictate that in the interest of fairness, courts should not do so.[114]

Perhaps the Ohio Supreme Court intended retroactive application only for the *Albritton* case. If so, the possibility exists that yet another charitable immunity decision will be necessary to clarify the court's intent, as occurred with the doctrine of sovereign immunity.[115] This possibility could have been avoided had the majority simply declared that the abolition of the doctrine of charitable immunity will be applied prospectively.[116]

VI. LEGISLATIVE ACTIVITY AFTER THE ABOLITION

As of yet, the Ohio General Assembly has not made an attempt to reinstate charitable immunity. That does not, however, mean that such an attempt will not be made in the future. In 1959, three years after *Avellone v. St. John's Hospital*,[117] the Ohio General Assembly introduced a bill[118] which provided for the reinstatement of charitable im-

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113. The Ohio Constitution provides:

> The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State.

OHIO CONST. art. II, § 28.

114. Until the *Enghauser* and *Albritton* decisions, it appeared that the Ohio Supreme Court advocated such a policy because the court previously held: "The constitutional prohibition against retroactive laws is a 'protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby.' " State *ex rel.* Shady Acres Nursing Home, Inc. v. Rhodes, 7 Ohio St. 3d 7, 10, 455 N.E.2d 489, 492 (1983) (quoting Lakengren v. Kosydar, 44 Ohio St. 2d 199, 201, 339 N.E.2d 814, 815 (1975)). Although the Ohio Supreme Court was referring to protection of the individual, there is no reason why such protection should not be extended to organizations. Apparently, the Ohio Supreme Court does not "practice what it preaches."

115. For a brief explanation of the judicial abolition of sovereign immunity, see *supra* notes 1–3 and accompanying text.

116. Although the abrogation of charitable immunity will be applied retroactively, the consequences might not be as devastating as one might initially believe because of the statute of limitations applicable to torts. Under Ohio law, an action for bodily injury must be brought within two years after it occurs. OHIO REV. CODE ANN. § 2305.10 (Page Supp. 1984). Additionally, a minor must bring a cause of action within two years after the age of majority is reached. *Id.* § 2305.16 (Page 1981). Thus, the actual number of cases that could be litigated because of the retroactive application of the abrogation of charitable immunity will probably be less than anticipated.

117. 165 Ohio St. 467, 135 N.E.2d 410 (1956).

118. Substitute Senate Bill No. 241 provided:

> A nonprofit corporation, society, or association organized exclusively for religious, charitable, educational or hospital purposes shall not be liable by reason of the acts of its servants or agents for loss or damage arising from injury to or death of a beneficiary to whatever

munity for hospitals except in cases of gross negligence by an organization's employee. The bill was, however, vetoed by the Governor,[119] and although it subsequently passed a Senate re-vote, it failed in the House.[120] Moreover, the general assembly has recently reconsidered the Ohio Supreme Court's 1983 abrogation of sovereign immunity. H. 176,[121] which was enacted on November 20, 1985, has partially reinstated immunity for municipalities.[122] Thus, although the Ohio Supreme Court acknowledges the waning importance of immunity doctrines, the Ohio General Assembly may not be ready to do the same, as it indicated by its recent enactment of H. 176. Consequently, it is conceivable that the legislature could attempt to reverse the *Albritton* decision through statutory enactment.

VII. CONCLUSION

Under *Albritton v. Neighborhood Centers Association for Child Development*,[123] Ohio charitable institutions are no longer immune from liability for their tortious conduct. Given the mottled history of charitable immunity in Ohio, the Ohio Supreme Court's definite stance on the immunity is long overdue. Total abrogation of the immunity will provide uniform treatment of all charities, as well as definite guidelines as to when liability will be imposed. Although this may seem unfair to smaller charities, special exceptions should not be made for individual charities. This paternalistic attitude resulted in the immunity's previous state of disarray.

Nevertheless, the victory of the abolition of charitable immunity is

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degree of the works or services of such nonprofit corporation, society, or association, unless such injuries or death are caused by the gross negligence of the agent or servant of such corporation, society, or association acting within the scope of his employment.

Payment to a nonprofit corporation, society, or association for its works or services shall not exclude a person from being in the class of a beneficiary of such works or services.

Gibbons v. YWCA, 170 Ohio St. 280, 285–86, 164 N.E.2d 563, 567 (1960). The bill passed the Senate by a vote of 29 to 1. Sub. S. B. No. 241, 103d Ohio General Assembly, 1st Reg. Sess., 128 OHIO SENATE J. 599, 599 (May 20, 1959). It also passed the House by a vote of 93 to 32. *Gibbons*, 170 Ohio St. at 285, 164 N.E.2d at 567. Such a wide margin indicates the vehemence with which the abrogation of the doctrine was attacked. Perhaps the present Ohio General Assembly will feel as strongly about this issue. However, given the many public policy changes that have occurred in the 25 years since the bill was introduced, the present legislature may not seek to reinstate the immunity, or at least not to the extent that the 1959 General Assembly did.

119. The Governor explained that his veto grew out of concern for an individual so severely injured through employee negligence that he or she could not earn a living, whether such negligence was gross or *de minimis*. Governor's Veto Message, 128 OHIO SENATE J. 1393, 1393 (Aug. 14, 1959) (Gov. Michael V. Disalle).

120. *Gibbons*, 170 Ohio St. at 285, 164 N.E.2d at 567–68.

121. Act of November 20, 1985, 58 OHIO ST. B.A. REP. 1907 (1985) (to be codified in scattered sections of chs. 1, 3, 5, 7, 33, 47, and 55 OHIO REV. CODE ANN.).

122. *See supra* note 2.

123. 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984).

tainted. The Ohio Supreme Court relied upon only a few justifications for the abrogation of the immunity, thereby excluding numerous other justifications which are equally important. Because the *Albritton* majority failed in this respect, it also failed to convince the dissent that the doctrine should be destroyed. Such a failure resulted in a split in the court where there could have been unanimity.

A unanimous decision abolishing a chaotic rule, such as the doctrine of charitable immunity, would undeniably have more precedential value than a split decision. Because a unanimous decision speaks with more finality, the majority should have strived for unanimity. Because it did not, however, the *Albritton* decision could give rise to future litigation, as it becomes necessary to interpret the exact meaning of the holding.

Still, the Ohio Supreme Court recognized that the doctrine of charitable immunity was outmoded and produced inconsistent and unjust results. Accordingly, the court abolished the doctrine and should be commended for doing so.

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