

**CHARITABLE IMMUNITY AS A DEFENSE TOOL
IN
MEDICAL MALPRACTICE CASES**

By Glen A. Huff¹

The doctrine of Charitable Immunity in Virginia, although having shrunk over the years², remains an effective tool for defense of medical malpractice claims in the proper case. Moreover, with some corporate planning, the defense may be made available in clinics and practices which provide charitable care for indigent patients. Structuring separate charitable entities through which medical services are delivered to uninsured and impecunious patients could help insulate health care practitioners from medical malpractice claims.

I. History and Purpose of Charitable Immunity.

The doctrine of charitable immunity has long been part of the fabric of the common law in Virginia. *Ettlinger v. Trustees of Randolph Macon College*, 31 F. 2d 869, 871 (1929). The doctrine arises from a public policy that promotes charitable endeavors to provide needed services for the public good. *Moore v. Warren*, 250 Va 421, 423, 463 S.E.2d 459, 460 (1995). Absent tort immunity, negligence claims would consume charitable contributions of time and resources, thereby detracting from provision of charitable services.

The *Ettlinger* Court was quoted in *Memorial Hospital v. Oakes* as follows:

A policy of the law which prevents him who accepts the benefit of a charity from suing it for the torts of its agents and servants, and thus taking for his private use the funds which have been given to humanity, which shields gifts made to charity from the “hungry maw of litigation” and conserves them for the purposes of the highest importance to the state, carries on it face its own justification, and, without the aid of metaphysical reasoning, commends itself to the wisdom of mankind.

The Memorial Hospital, Inc. v. Oakes, 200 Va. 878, 888, 108 S.E.2d 388, 395 (1959)(citing with approval, *Bodenheimer v. Confederate Memorial Ass’n.*, 68 F.2d 507 (1934)).

¹Mr. Huff is the founder and co-managing shareholder of Huff, Poole & Mahoney, P.C., with offices in Virginia Beach and Chesterfield, Virginia. The author wishes to acknowledge and express appreciation to Madeline Hawks Stark for her time and talent expended in editing this paper.

²Va. Code § 8.01-38; *Radosevic v. Virginia Intermont College*, 633 F.Supp. 1084 (W.D.Va. 1986); *Purcell v. Mary Washington Hospital*, 217 Va. 776, 232 S.E.2d 902 (1977).

Prior to the enactment of Va. Code § 8.01-38 (eliminating application of the doctrine of Charitable Immunity to hospitals) the Supreme Court of Virginia wrote in strong support of the need for Charitable Immunity for hospitals on the basis of public policy. In *Hill v. Memorial Hospital, Inc.*, 204 Va. 501, 132 S.E.2d 411 (1963), the Court reasoned:

It cannot be debated that the care of the sick and injured is a public purpose, a matter of public concern. When a portion of the responsibility therefor is borne by the gifts of the philanthropic-minded, so much of the burden is removed from the public. If a portion of those gifts is diverted to the payment of tort claims, without restriction, the spirit and intent of the gifts are, at once, nullified and that much of the burden is again cast upon the public.

Id. at 507, 132 S.E.2d 411, 507. The statute that eliminates charitable immunity as a defense for hospitals is in derogation of Virginia's common law and therefore presumably would be narrowly construed to apply to hospitals only, leaving application of the doctrine available for other instances of medical care.³

II. Evolution of the doctrine of Charitable Immunity in the context of medical malpractice claims.

In some contexts, the doctrine of Charitable Immunity has been eroded because of the application of insurance to protect the institution. Such sentiments appear to have been a basis for the 1974 decision of the General Assembly to remove charitable immunity protection from hospitals in Virginia. See Va. Code § 8.01-38. Outside the medical context the doctrine of Charitable Immunity has been well recognized but not uniformly applied, probably because of the harsh results that can occur. Compare, e.g. *Ola v. YMCA*, Law No.: CL03-2755 (Cir. Ct. of Norfolk September 10, 2004)(Judge Charles Poston)(holding that the YMCA was a charitable entity and that the child plaintiff was a beneficiary whose tort claim for sexual assault was barred by the doctrine of Charitable Immunity) with *Brown v. YMCA*, Law No.: CL00-250 (Cir. Ct. of Chesapeake December 12, 2000)(Judge Bruce Kushner)(holding that the YMCA was not a charitable entity and could not claim immunity in a slip and fall case).

Concerns over sky-rocketing medical expenses and escalating malpractice insurance premiums have now generated a nation-wide crisis in the field of medicine. High insurance premiums or, in some instances, lack of availability of coverage, may provide renewed acceptance of the doctrine of Charitable Immunity as applied to medicine.

³Even the statute that eliminates the doctrine of charitable immunity as a defense to hospitals has a provision allowing application of the doctrine to hospitals that satisfy the criteria for charitable immunity so long as a written waiver is executed by the patient at the time of admission. See Va Code § 8.01-38(ii). Such provision appears custom designed to allow even hospitals to structure a charitable entity that could receive the benefit of Charitable Immunity.

Fortunately, sufficient vestiges of the doctrine of Charitable Immunity remain to allow the construction of a corporate organization that should allow application of the defense of Charitable Immunity in tort actions.⁴ While such entities should not forego insurance (because of the vagaries encountered in the application of law), a charitable corporate structure and practice could, over time, help improve loss experience and thereby assist in lowering, or better controlling, insurance rates for entities that are afforded the protection of charitable immunity.

III. A case study (*Kremen v. Bon-Secours-DePaul Medical Center, et. al.*).

A recent decision from the Circuit Court for the City of Norfolk serves as an example of the application of the doctrine of Charitable Immunity in the context of a separate charitable organization through which a physician provided clinical services. *Kremen v. Bon-Secours-DePaul Medical Center, et. al.*, Law No. L01-2959 (Cir. Ct. of Norfolk March 29, 2004)(Judge Jerome James).

A Russian immigrant named Nelya Khmurovia reported to the clinic at DePaul Hospital in Norfolk, Virginia, on January 21, 2000, with complaints of episodic chest and right shoulder pain. He was seen by two residents from the Eastern Virginia Medical School, practicing under the supervision of a faculty member, Dr. Herschel Estep. Khmurovia died later in the day, shortly after being admitted to the hospital for care.

A medical malpractice action was brought naming the two residents and the supervising faculty member as defendants. In due course the residents were dismissed under the doctrine of Sovereign Immunity because they were practicing, under supervision, as students of a school that was established as a “body politic” of the Commonwealth of Virginia. See Va. Code § 23-14 ; *County of York v. Peninsula Airport Commission*, 235 Va. 477, 480-81, 369 S.E.2d 665, 667 (1988); *Richmond v. Metropolitan Authority*, 210 Va. 645, 647, 172 S.E.2d 831, 832 (1970). The residents were found to satisfy the four part test enunciated in *Messina v. Burden*, 228 Va 301, 321 S.E.2d 657 (1984), thereby entitling them to sovereign immunity protection. Accordingly, the supervising faculty member was left as the sole physician named in the malpractice action. Such result is typical in the context of faculty overseeing the work of their residents. See *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980).

Dr. Estep was employed at the medical school in a dual capacity. One part of his employment was to provide classroom instruction at the medical school. The second component of Dr. Estep’s employment was that his clinical practice was to be performed exclusively through the EVMS Academic Physicians and Surgeons Health Services Foundation. The Health Services Foundation was established as a charitable corporation providing clinical instruction to students of the school in various hospitals and clinics in the Norfolk, Virginia area. The Health Services

⁴Additionally, immunity is provided by statute for certain categories of emergency care. Va Code § 8.01-225. Similarly immunity is extended to certain state approved free clinics. Va Code §§ 32.1-127.3; 54.1-106.

Foundation was at all times recognized by the IRS as a 501(c)(3) charitable organization. The Foundation provided health care services to the community, regardless of insurance or the patients' abilities to pay. Those services were provided through contracts with local hospitals. Dr. Estep's clinical practice was restricted exclusively to work done through the Health Services Foundation and Dr. Estep was not permitted to decide which patients he would accept. The Health Services Foundation, through service contracts, decided who would be Dr. Estep's patients.⁵

Significantly, the Health Services Foundation was established and operated as a charitable entity. Both criteria must be satisfied to qualify for the charitable immunity defense in actions brought by beneficiaries of the charity. The threshold for application of the doctrine of Charitable Immunity is that the defendant must (1) be organized and established as a charity and (2) the defendant must act consistent with its charitable purposes. *Radosevic v. Virginia Intermont College*, 633 F. Supp. 1084, 1086 (1986). Furthermore, the claimant must have been a beneficiary of the charity in order for the protection to apply. *Ettlinger v. Trustees of Randolph Macon College*, 31 F. 2d 869, 871 (1929); *cf.*, *Thrasher v. Winard*, 239 Va 338, 340, 389 S.E.2d 669, 701 (1990) (“charitable institutions are immune from liability based upon claims of negligence asserted by those that accept their charitable benefits.”).

In Dr. Estep's defense, a Plea of Charitable Immunity was filed with the Circuit Court, entitling the defense to an evidentiary hearing to allow development of the proof necessary for the defense. *See e.g. Johnson v. Church Schools etc.*, 1988 WL 619123 (Va Cir. Ct. February 17, 1988)(allowing *ore tenus* hearing on special plea of Charitable Immunity). At the hearing live testimony and documentary evidence were presented establishing that the Health Services Foundation was chartered as a charitable entity, that its purpose and mission were charitable, that it had been duly recognized by the IRS as a charity, that it did not generate a profit, that the organization had no shareholders to whom monies would flow, that the income of the Health Services Foundation was utilized exclusively for its charitable purpose, that Dr. Estep was at all pertinent times serving as an employee and agent of the Health Services Foundation and that he had been recruited through responsible actions that included thoroughly researching Dr. Estep's background. *See, The Memorial Hospital, Inc. v. Oakes, Adm's, etc*, 200 Va 878, 885, 108 S.E.2d 388, 393 (1959) (“Thus we see that the doctrine in Virginia was established that a charitable or eleemosynary institution is liable to beneficiaries of the charity for negligence of its employee if it fails to exercise ordinary care in the selection and retention of its employees. But where there has

⁵A similar case pending in the Norfolk Circuit Court has found that defendants met their *prima facie* burden of establishing the Health Services Foundation to be a charitable entity and establishing that the plaintiff-patient was a beneficiary thereof. *Mann v. Sentara Hospitals, et al.*, Law No.: L98-621 (Cir. Ct. Norfolk September 11, 2002)(Judge Charles Poston). In that case, however, a question was presented as to whether the physician was an agent of the Health Services Foundation or an independent contractor under the four part test of *McDonald v. Hampton Training School for Nurses*, 254 Va. 79, 81, 486 S.E.2d 299, 301 (1997). A further evidentiary hearing has been scheduled on that issue as part of the Plea of Charitable Immunity.

been due care in their selection and retention, a charitable institution is immune from liability to beneficiaries of the charity of their torts.”).

In the suit pending in the Norfolk Circuit Court, the Motion for Judgment alleged that plaintiff had received medical care from, or at the direction of, Dr. Estep, thereby satisfying the element that the claimant must have been a beneficiary of the charitable enterprise.

Following an evidentiary hearing, including live testimony from the Director of the Health Services Foundation, the case was dismissed as to Dr. Estep on the basis of Charitable Immunity. The court held:

the Foundation [was] a charitable organization, that Dr. Estep was engaged in the Foundation’s work at the time of the alleged negligence, and that the decedent was a beneficiary of the Foundation’s charitable works. For these reasons, Dr. Estep [was] entitled to share in the Foundation’s charitable immunity.

Kremen, supra.

A copy of the Court’s memorandum opinion is attached.

IV. Separating charitable medical care practice through corporate structure.

The structure of the Health Services Foundation as the clinical practice arm of the medical school provides a model strategy for application of the doctrine of Charitable Immunity. In the context of the medical school the structure is designed, *inter alia*, to protect faculty members from medical malpractice claims brought by the recipients of their charitable work. Other health care providers might consider establishing a charitable entity, with a clearly stated charitable mission and a letter ruling from the IRS, through which to provide services to indigent patients. As long as the entity is established and operated as a charity, the entities’ patients would likely be barred by the doctrine of Charitable Immunity from making tort claims.

Under the reasoning of *The Memorial Hospital, Inc. v. Oakes, Adm’s, etc*, Charitable Immunity would still apply even if some payments were received to offset expenses, so long as no profit was generated to the bottom line. *The Memorial Hospital, Inc. v. Oakes, Adm’s, etc*, 200 Va 878, 885, 108 S.E.2d 388, 393 (1959)(“In the class of beneficiaries we include as well those who pay for the services as those who do not.”). If a health care provider is providing free or low pay services, they may find tax benefits as well as tort protections as a result of donating space, equipment use, and services to the charitable enterprise. As a precautionary measure the charity should, of course, be included as a named insured or an additional insured in any policy providing professional malpractice insurance.

If the structure as outlined above in the *Estep* case provides a potential immunity defense to the Health Services Foundation in the proper case, then such structures may be beneficial to other health care entities, including, for example, hospitals or medical practices that perform substantial charitable work through a separate charitable entity. Although charitable immunity that once freely applied to hospitals has now been abrogated by statute, Va Code § 8.01-38, that statute, if strictly construed, appears to have no application to a separate wholly owned subsidiary corporation established for charitable purposes and employed to deliver medical services to that segment of the population that now receives clinical benefits directly from the hospital, only to be written off for lack of insurance.

V. Conclusion

Establishment of charitable entities through which to deliver medical services to the uninsured or underinsured patient could provide protections and benefits to the health care provider while at the same time extending services to a segment of society that greatly needs such services on a free or low-pay basis.