

## VOLUNTEER PROTECTION ACT OF 1997

### I. CHARITY AND THE COMMON LAW

We start with general principles. For negligent or tortious conduct liability is the rule. Immunity is the exception. Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. Likewise trustees and other fiduciaries generally are liable for their own negligence in administration and operation of the business or property committed to their control. Respondeat superior more and more has made them, as it has private corporations, responsible for wrongs done by their inferior functionaries.

Generally also charity is no defense to tort. For wrong done, it is no answer ordinarily to say, "He did not pay and was not bound to pay for the service. I gave it to him." One who undertakes to aid another must do so with due care. Whether the Good Samaritan rides an ass, a Cadillac, or picks up hitchhikers in a Model T, he must ride with forethought and caution. He is not relieved because it is his driver rather than himself who lapses into carelessness. Nor does it matter that the doer of good is a corporation, if the act of gratuitous service is fairly incidental to the business. Railroad companies, through their employees, may and often do undertake to do more for the passenger than the strict bargain or duty of carriage requires. But if they depart from normal conduct in doing it, they pay for the deviation. Charity and gratuity generally go to motive, not to duty. The automobile guest statutes show that legislation has been required to modify the common-law rule, though even in this application they do not entirely abolish it. 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.

*President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 812-13 (D.C. Cir. 1942) (footnotes omitted).

### II. CHARITABLE IMMUNITY

Immunity of charitable organizations from tort liability

#### A. Types of institutions

##### 1. Government entities

2. Schools
  3. Hospitals
  4. Nonprofit organizations
- B. Basic Rationales
1. Trust fund
  2. Inapplicability of doctrine of respondeat superior
  3. Implied waiver or assumption of risk
  4. Public policy
- C. Appearance in United States -- *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 32 (1876).
- (Earlier repudiated in England -- *Mersey Docks Trustees v. Gibbs*, 11 Eng. Rep. 1500, 11 H.L. Cas. 686 (1866)).
- D. Disapproval in United States. -- *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).
- E. Many states have totally abolished the doctrine of charitable immunity. Louisiana is among them. *See Garlington v. Kingsley*, 289 So. 2d 88 (La. 1974).
- F. Some states, however, retain the doctrine in whole or in part.
1. Retained, for negligence of agent or employee, where plaintiff is beneficiary
  2. Retained as to trust fund property only
  3. Retained for charitable activities only
  4. Statutory dollar limit on recovery

### III. RESPONDEAT SUPERIOR

The common-law doctrine holding an employer or principal liable for an employee's or agent's actions (including torts) committed during the scope of employment (also termed master-servant rule)

- A. Negligence of servant
- B. Master-servant relationship

- C. Scope of employment
- D. Application of doctrine to nonprofit organizations. Example: *Doe v. Roman Catholic Church*, 615 So. 2d 410 (La. App. 4th Cir.), *writ denied*, 618 So. 2d 412 (La. 1993) and *writ denied*, 618 So. 2d 413 (La. 1993).

#### IV. STATE STATUTES

- A. Variety
- B. Nonprofit Risk Management Center in cooperation with the American Bar Association. "State Liability Laws for Charitable Organizations and Volunteers." Washington, D.C. 1995.

Nonprofit Risk Management Center  
1001 Connecticut Avenue, NW, Suite 900  
Washington, DC 20036  
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- C. Example: Louisiana (See Exhibit A)

#### V. VOLUNTEER PROTECTION ACT OF 1997

- A. Constitutional Problems
  - 1. An earlier version of the Act would have provided additional block grants for states that had enacted volunteer protection laws in accordance with the Act.
    - (a) Spending Power
    - (b) No federal overlay
  - 2. The Volunteer Protection Act of 1997 does not take this earlier, voluntary approach in reliance on the spending power, but rather is a positive enactment of federal law. The Act itself gives two constitutional grounds for its enactment.
    - (a) Article 1, Section 8, Clause 3 of the United States Constitution (the commerce clause).
    - (b) The Fourteenth Amendment to the United States Constitution (due process).
  - 3. The commerce clause ground may not be valid. *See United States v. Lopez*, 115 S. Ct. 1624 (1995).
  - 4. The due process ground may not be valid.

B. Effective Date and Application

1. The Act takes effect ninety (90) days after its enactment on June 18, 1997. Therefore, the Act's effective date was September 16, 1997. 42 U.S.C. § 14501, Note.
2. For the Act to apply, a claim must be filed on or after the effective date, September 16, 1997, and the harm that is the subject of the claim or the conduct that caused the harm must occur after the effective date, September 16, 1997. 42 U.S.C. § 14501, Note.

C. Definitions

1. Economic loss
2. Harm
3. Noneconomic losses
4. Nonprofit organization
5. State
6. Volunteer

42 U.S.C. § 14505

D. General exceptions

1. The limitations on the liability of a volunteer under the Act do not apply to:
  - (a) Crimes of violence;
  - (b) Acts of international terrorism;
  - (c) Hate crimes;
  - (d) Sexual offenses;
  - (e) Civil rights violations; and
  - (f) Misconduct under the influence of intoxicating alcohol or any drug.

42 U.S.C. § 14503(f)

2. Effect on State Law

See House Report (Judiciary Committee) No. 105-101 (Part I), May 19, 1997, Dissenting Views, pp. 166-67.

E. Preemption and Election of State Nonapplicability

1. The Act preempts state law to the extent it is inconsistent, except that state law may provide additional protection from liability relating to volunteers. 42 U.S.C. § 14502(a).
2. A state may elect that the Act not apply “to any civil action in a State court against a volunteer in which all parties are citizens of the State.” 42 U.S.C. § 14502(b).

F. Limitation on Liability for Volunteers

Limitation on liability for harm caused by ordinary negligence

1. “[N]o 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 four conditions are satisfied:

- (a) Scope of responsibilities;
- (b) Properly licensed, certified, or authorized;
- (c) Harm 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; and
- (d) No operation of vehicle.

42 U.S.C. § 14503(a).

2. Qualifications

- (a) A nonprofit organization may still bring a civil action against a volunteer. 42 U.S.C. § 14503(b).
- (b) No effect on liability of nonprofit organizations. 42 U.S.C. § 14503(c).
- (c) State may condition the limitation of volunteer liability upon one or more of the following:
  - (1) Risk management procedures/mandatory training;

- (2) Application of respondeat superior to nonprofit organizations;
- (3) Civil action brought by state or local government officer; and
- (4) Financially secure source of recovery.

42 U.S.C. § 14503(d).

#### G. Punitive Damages

1. Punitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer:
  - (a) acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity;
  - (b) unless the claimant establishes by clear and convincing evidence;
  - (c) that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

42 U.S.C. § 14503(e)(1)

2. Note evidentiary component of punitive damages limitation.
3. Further federal or state law limitations on punitive damages are permitted. 42 U.S.C. § 14505(e)(2).
4. Protection from punitive damages § 14503(e) is broader than the general limitation on liability for harm caused by ordinary negligence in § 14503(a). For example, there is protection from punitive damages even if a volunteer is not properly licensed; even if a volunteer is driving a car; or even if harm is caused by gross negligence or reckless misconduct, provided the harm is not caused by willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed.
5. Do §§ 14503(b) and (d) apply to the punitive damages limitation? They most probably do, but note the lack of cross-references in § 14503(e).
6. Furthermore, why do the limitations on punitive damages and the general exceptions appear in this section at all? Note the attempt to avert some interpretative difficulties by adding § 14503(f)(2).

## H. Liability for noneconomic loss

1. Volunteer is liable only for amount of noneconomic loss allocated to volunteer in direct proportion to percentage of responsibility of volunteer for harm to claimant. 42 U.S.C. § 14504.
  - (a) Trier of fact determines percentage of responsibility. 42 U.S.C. § 14504(b)(2).
  - (b) Court renders separate judgments. 42 U.S.C. § 14504(b)(1)
  - (c) Noneconomic losses. 42 U.S.C. § 14505(3)
  - (d) Joint and Several Liability -- liability “together and in separation”; liability apportionable either among two or more parties or to only one or a few select members of the group, at the adversary’s discretion. (Also termed solidary liability or liability *in solido*.)
2. Like protection from punitive damages, the rule concerning liability for noneconomic loss in § 14504 has broader application than the general limitation on liability for harm caused by ordinary negligence in § 14503(a). For example, the rule concerning liability for noneconomic loss applies even if the volunteer is not properly licensed; even if the volunteer is driving a car; or even if the harm is caused by gross negligence or reckless misconduct.
3. The qualifications in §§ 14503(b), (c), and (d) do not apply to the rule concerning liability for noneconomic losses.
4. The rule concerning liability for noneconomic loss in § 14504 also has broader application even than protection from punitive damages in § 14503(e). There is no requirement of clear and convincing evidence, and the rule concerning liability for noneconomic loss presumably applies even if the harm is caused by willful or criminal misconduct or a conscious, flagrant indifference to the rights or safety of the individual harmed.

## VI. SUMMARY

- A. Three types of protection for volunteers
  1. Ordinary negligence - limited protection
  2. Punitive damages - broader protection
  3. Noneconomic loss - broadest protection

B. Three Important Points

1. Little Effect on Liability of Nonprofit Organizations

“Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.” 42 U.S.C. § 14503(c).

Since subsection (c) refers to “this section,” *i.e.* § 14503, other sections of the Act might arguably be “construed to affect the liability” of nonprofit organizations, *e.g.* § 14502 and §14504.

2. Some Effect on Liability of Volunteers

H.R. 911, as amended, [1] immunizes a volunteer from liability for harm caused by ordinary negligence, and [2] prohibits the recovery of punitive damages unless the volunteer’s conduct was willful, criminal, or in conscious flagrant indifference to the rights or safety of the claimant. It also provides [3] that a volunteer’s liability for noneconomic damages will be limited to the proportion of harm for which that volunteer is found liable. These **modest limitations** are intended to remove a significant barrier -- the fear of unreasonable legal liability -- to inducing individuals to volunteer their time to charitable endeavors.

House Report (Judiciary Committee) No. 105-101 (Part I), May 19, 1997 (numbering and emphasis added).

3. Complex Relationship with State Law

(a) See especially Sections V.E., F., and G., above

(b) No state legislature has enacted or is considering a nonapplicability law. *See* 42 U.S.C. § 14502(b).

**VII. CONCLUSION**

A. Modest limitations.

B. No reason to relax vigilance; perhaps even reason for added vigilance.