

VOLUNTEER IMMUNITY: MAINTAINING THE VITALITY OF THE THIRD SECTOR OF OUR ECONOMY

by David W. Hartmann*

The doctrine of charitable immunity, which once shielded nonprofit organizations from tort liability, no longer exists. In Congress, however, legislation has been introduced which would grant immunity from tort liability to volunteers working for a "nonprofit organization or governmental entity."¹ This legislation is in response to the threat of individual tort liability having chilled the recruitment of volunteers and having limited the scope of activities which volunteers are willing to undertake.² The Volunteer Protection Act, H.R. 911, is a recognition that volunteerism has always been an important part of American life³ and that nonprofit organizations have become an essential economic component of our society. Accordingly, public policy naturally supports the granting of immunity to volunteers.⁴

Volunteer immunity differs significantly from the old doctrine of charitable immunity. The notion that a charity was not liable in tort first appeared in the American courts in 1876.⁵

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1. H.R. 911, 101st Cong., 1st Sess. (1989) [hereinafter H.R. 911]. Identical legislation is expected to be introduced in the Senate.

2. See *infra* note 33 for the purposes of H.R. 911.

3. "Que Pasa?", NUESTRO, at 9 (December, 1981). New York Governor Mario Cuomo has stated that "volunteering is the highest service within our reach." *New York State Governor's Office for Voluntary Service, CITIZEN INVOLVEMENT*, at 2 (Summer 1988). A national survey conducted in March 1988 found that "[e]ighty-seven percent of respondents believe that charitable organizations play a significant role in American Society." *Giving and Volunteering in the United States, INDEPENDENT SECTOR* (with the Gallup Organization 10 (1988) [hereinafter *Giving and Volunteering*].

4. A number of volunteer organizations are interested in H.R. 911, including Independent Sector, the American Society of Association Executives, the American Society of Museums, and the American Association of Retired Persons.

5. *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 32 (1876). Ten years earlier, the doctrine that a public body was not liable in tort had been repudiated in England.

Bridgport Law Review 1989

Thereafter, the doctrine of charitable immunity was applied by courts throughout the United States in order to protect charities and other nonprofit organizations from tort liability and, thereby, to ensure their continued existence. In 1942, in the case of *President and Directors of Georgetown College v. Hughes*,⁶ the United States Court of Appeals for the District of Columbia revised the many justifications which traditionally had been invoked to support charitable immunity. Justice Rutledge, writing the opinion for the majority, concluded that the doctrine should be abolished entirely. The doctrine fell into disfavor, and the courts eventually abandoned it.

Today, nonprofit organizations⁷ can be held liable for the tortious acts of their agents under the theory of respondeat superior.⁸ Thus, a tort victim may seek damages from the nonprofit entity, its employees, and its volunteers.

Charitable immunity never protected volunteers.⁹ It is merely coincidental that, by the time charitable immunity died out, volunteer immunity had gained public support. The argu-

Mersey Docks Trustees v. Gibbs, 11 Eng. Rep. 1500, 11 H.L. Cas. 686 (1866).

6. 130 F.2d 810 (D.C. Cir. 1942).

7. Ordinarily, a nonprofit organization is chartered by the state in which it is incorporated. Section 501 of the Internal Revenue Code enumerates those organizations which are exempt from federal taxation, but does not define the term "nonprofit organization." Essentially, the list in section 501(c) is comprised of nonprofit entities, both public and private.

8. Under the theory of *respondeat superior*, the master is liable for torts committed by his servant. *RESTATEMENT (SECOND) OF AGENCY* § 219 (1958). See also Note, *Vicarious Liability—A Limited Application of Respondeat Superior to Political Campaigning*, 29 CASE W. RES. L. REV. 856, 871-872 (1979) (volunteers considered employees for purposes of *respondeat superior*).

9. *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810, 814 (D.C. Cir. 1942).

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

Justice Rutledge went on to quote from a then current law review as follows: What possible rational basis could the court have for distinguishing . . . between a charitable institution and a charitably disposed individual? . . . If the policy of the law is to encourage donations to charity, the same policy would seem to favor and foster other individual acts of kindness and helpfulness; yet the courts do not hesitate to hold an individual 'good Samaritan' liable for his failure to exercise due care.

Id. at 815 n.14.

ments raised against the doctrine of charitable immunity should not automatically be invoked to defeat volunteer immunity. Even Justice Rutledge in the *Georgetown College* case acknowledged that, "If charity should exempt either institutions or individuals, it should be the latter."¹⁰

State Statutes Addressing Volunteer Immunity

Today, many state statutes grant immunity to volunteers, but only a few of these statutes achieve the scope of the pending Volunteer Protection Act. For example, some local laws grant tort immunity only to certain classes of volunteers. The state of Connecticut protects any person who donates food to a nonprofit organization, but the protection does not extend to the nonprofit donee organization.¹¹ On the other hand, Missouri protects the donee organization as well as the volunteer donor.¹² Alaska protects members of governing bodies of certain organizations, such as school boards and hospitals.¹³ Colorado grants immunity to volunteers working with youngsters in nonprofit programs.¹⁴ In

10. *Id.* at 814. Justice Rutledge went on to say that there should be no distinction.

Id.

11. CONN. GEN. STAT. § 52-557(a) (1983). Section 52-557(a) provides: [A]ny person, including but not limited to a seller, farmer, processor, distributor, wholesaler or retailer of food, who donates an item of food for use or distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless it is established that the donor knew or had reasonable grounds to believe that the food was (1) adulterated as defined in section 21a-101 or (2) not fit for human consumption, at the time the donor made the gift.

Id.

Section 42-557(b) provides that: "[N]othing in this section limits the liability of the donee organization or corporation accepting the food." Under this statute it appears that the ultimate burden to screen food quality devolves upon the donee organization, and the risk of loss remains with it. *Accord* OKLA. STAT. ANN. tit. 76, § 5.6 (West 1981).

12. MO. REV. STAT. § 537.115(3) (1981) states:

All other provisions of law notwithstanding, a bona fide charitable or not-for-profit organization which in good faith receives and distributes food, which complies with chapter 196, RSMo, at the time it was donated and which is fit for human consumption at the time it is distributed, without charge, shall not be subject to criminal or civil liability arising from an injury or death due to the condition of such food unless such injury or death is a direct result of the negligence, recklessness, or intentional misconduct of such organization.

Id. *Accord* TEX. CIV. PRAC. & REM. CODE ANN. § 76.004 (Vernon 1981).

13. ALASKA STAT. § 09.17.050 (1986).

14. COLO. REV. STAT. § 13-21-116 (2.5)(a)(1987).

some states, automobile guest statutes protect, with certain prescribed limitations, those who transport others without payment.¹⁵

Many state statutes which grant volunteers immunity protect only the directors and officers of nonprofit organizations, excluding from coverage direct service volunteers who lack director or officer status.¹⁶

Some statutes do not protect the defendant from paying all damages, but merely place a ceiling on the amount of the award. For instance, in Delaware, if the volunteer's negligent act or omission involved the operation of a motor vehicle, the victim may sue the volunteer, but he may recover damages only if the volunteer had insurance, and even then only to the extent of the coverage under the policy.¹⁷ In Kansas, volunteers are protected if they perform services for a nonprofit organization which "carries general liability insurance coverage."¹⁸ If the Kansas volunteer has personal liability coverage, he remains liable for acts or omissions, but "only to the extent of the insurance coverage."¹⁹ Texas grants full protection to volunteers of charitable organizations and places a limit on the amount of damages a paid employee²⁰ or the charitable organization²¹ itself can be ordered to

15. The Texas guest statute limits the liability protection to owners or operators who are closely related to the victim of an accident.

A person who is related to the owner or operator of a motor vehicle within the second degree of consanguinity or affinity and who is being transported in the motor vehicle over a public highway of this state as a guest without payment for the transportation has a cause of action against the owner or operator of the motor vehicle for injury, death, or loss in an accident only if the accident was intentional on the part of the owner or operator or was caused by his heedlessness or reckless disregard of the rights of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 72.001 (Vernon 1985).

16. FLA. STAT. § 617.0285 (1987); ARIZ. REV. STAT. ANN. § 10-1017 D (1987); OKLA. STAT. ANN. tit. 18, § 866; CONN. GEN. STAT. § 52-557m (1987).

17. DEL. CODE ANN. tit. 10, § 8133(c) (1986).

18. KAN. STAT. ANN. § 60-3610(b) (1987).

If a nonprofit organization carries general liability insurance coverage, a volunteer of such organization shall not be liable for damages in a civil action for acts or omissions as such volunteer unless: (1) Such conduct constitutes willful or wanton misconduct or intentionally tortious conduct; or (2) such volunteer is required to be insured by law or is otherwise insured against such acts or omissions but, in such case, liability shall be only to the extent of the insurance coverage.

Id.

19. *Id.*

20. TEX. CIV. PRAC. & REM. CODE ANN. § 84.005 (Vernon 1987). "[T]he liability of

pay.

Some statutes protect public entities and their employees whether or not they are compensated. In Illinois, the laws protect "local public entities and public employees from liability arising from the operation of government."²³ Under the Illinois statute, "employee" includes any person who worked for the organization, or did so in the past, whether or not the person was compensated.²⁴ The statute is intended to encompass firemen, law enforcement officers, and school board members. These types of workers are often a mixed group of compensated and non-compensated individuals.

Not all state immunity statutes utilize the term "volunteer." Some use terms such as "member," "employee," "person," "officer," or "director," and these terms are not always well defined. Most statutes refer to section 501(c) of the Internal Revenue Code²⁵ for purposes of determining whether or not the organization in question falls within the statute. For example, a Delaware statute only protects volunteers associated with a federally tax exempt "organization."²⁶ Thus, in most states an individual must be associated with a tax exempt organization in order to be entitled to volunteer immunity. But not all "charitable" groups have tax exempt status.²⁶ For example, informal or short-term groups of volunteers, organized to meet some specific charitable need, and individuals acting alone without any affiliation to an organized entity would not be covered under most state statutes. The latter includes the "Good Samaritan."²⁷

the employee is limited to money damages in a maximum amount of \$500,000 for each single occurrence of bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property." *Id.*

21. *Id.* at § 84.006.

[I]n any civil action brought against a non-hospital charitable organization for damages based on an act or omission by the organization or its employees or volunteers, the liability of the organization is limited to money damages in a maximum amount of \$500,000 for each person and \$1,000,000 for each single occurrence of bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

Id.

22. ILL. REV. STAT. ch. 85, para. 1-101.1 (1986).

23. *Id.* at para. 1-202. Independent contractors are specifically excluded.

24. I.R.C. § 501(c)(1954).

25. DEL. CODE ANN. tit. 10, § 8133(a)(5) (1986).

26. See *supra* note 7 regarding tax-exempt status.

27. 1 S. SPEISER, C. KRAUSE, & A. GANS, THE AMERICAN LAW OF TORTS 791 (1983).

It is apparent that existing state legislation on volunteer immunity is not only piecemeal but also inconsistent from state to state.²⁸ Many of the statutes are not comprehensive in coverage, suggesting that groups with the most lobbying power have been the most successful in securing immunity for themselves, while leaving other volunteers open to liability.²⁹ The situation is an appropriate one for model legislation.

Federal Legislation Granting Volunteer Immunity

The Volunteer Protection Act of 1989, H.R. 911, now pending in Congress sets forth model legislation which would grant any volunteer or a nonprofit organization or governmental entity immunity³⁰ from tort liability. The individual must be acting in

"'Good Samaritan' statutes provide in essence that anyone who, in good faith renders emergency care or assistance at an accident, etc., shall not be liable for ordinary acts or omissions of negligence." *Id.* Colorado extends protection to the Good Samaritan whether or not the Good Samaritan is an individual or an organization.

"To encourage the provision of services or assistance by persons on a voluntary basis, a person shall not be deemed to have assumed a duty of care where none otherwise existed when he performs a service or an act of assistance, without compensation or expectation of compensation, for the benefit of another person, or adopts or enforces a policy or a regulation to protect another person's health or safety."

COLO. REV. STAT. § 13-21-116(2)(a) (1987). Under § 13-21-116(4) the term "person" is defined as "an individual, corporation, partnership, or association." *Id.* An Iowa statute provides that any person who, in good faith, renders emergency care or assistance without compensation at the place of an emergency or accident shall not be liable for any civil damages for acts or omissions "unless such acts or omissions constitute recklessness." IOWA CODE § 613.17 (1969). An Oklahoma statute, specifically entitled the "Good Samaritan Act," covers a large group of volunteers who are exempt from liability. OKLA. STAT. ANN. tit. 76, §5(4) (West 1979). *Accord* TEX. CIV. PRAC. & REM. CODE ANN. § 74 (Vernon 1985).

28. Individual state statutes which address volunteer immunity are typically found scattered in the compilations of state statutes. This makes a comprehensive survey of such statutes difficult even with the assistance of computerized research and contributes to confusion about this aspect of the tort process altogether. For a more complete summary of state statutes which address volunteer immunity, see S. McCurley, *An Analysis of Volunteer Protection Legislation* (September 1987) (unpublished paper prepared for the American Association of Retired Persons), Appendix 2, at 13.

29. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN., § 78.001 (Vernon 1985). In Texas, for example, "[a] volunteer fire fighter or a volunteer fire department is not liable for damage to property resulting from the fire fighter's or the department's reasonable and necessary action in fighting or extinguishing a fire on the property." *Id.* In Illinois, a similar statute confers immunity upon law enforcement officers and firemen, but without regard to whether or not they are compensated. ILL. REV. STAT. ch. 70, para. 61 (1989).

30. This legislation was introduced in the 100th Congress in 1987 as the Volunteer Protection Act of 1987. The 1989 version substituted the phrase "protection from per-

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good faith and within the scope of his or her official functions and duties with the organization or entity.³¹ Immunity would not be extended to an individual who caused an injury by "willful and wanton misconduct."³² As set forth in H.R. 911, the legislative purpose of the bill is to:

promote the interest of social service program beneficiaries and taxpayers and to sustain the availability of programs and nonprofit organizations and governmental entities which depend on volunteer contributions by encouraging reasonable reform of State laws to provide protection from personal financial liability to volunteers serving with nonprofit organizations and governmental entities for actions undertaken in good faith on behalf of such organizations.³³

sonal financial liability" for the term "immunity" in the 1987 version. Since the phrase defines the term, it is not immediately apparent why the change was made.

31. H.R. 911, *supra* note 1, at § 4(a)(1).

32. *Id.* at § 4(a)(2). See note 79 *infra* for further discussion of the phrase "willful and wanton."

33. H.R. 911, *supra* note 1, at § 2(b). According to Congressman Porter, "[T]he sole purpose of the H.R. 911/S. 929 is to ensure that volunteers keep coming forward to offer their services." *Volunteer Protection Act of 1987 Before the Senate Judiciary Subcommittee on Courts and Administrative Practices Hearings on S. 929/H.R. 911*, 100th Cong., 1st Sess. (May 20, 1988) (testimony of the Honorable John E. Porter, M.C., at 7) [hereinafter *1988 Hearings*]. The Texas Charitable Immunity and Liability Act of 1987, which took effect on September 1, 1987, sets forth the following findings and purposes:

(1) robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services;

(2) the willingness of volunteers to offer their services to these organizations is deterred by the perception of personal liability arising out of the services rendered to these organizations;

(3) because of these concerns over personal liability, volunteers are withdrawing from services in all capacities;

(4) these same organizations have a further problem in obtaining and affording liability insurance for the organization and its employees and volunteers;

(5) these problems combine to diminish the services being provided to Texas and local communities because of higher costs and fewer programs;

(6) the citizens of this state have an overriding interest in the continued and increased delivery of these services that must be balanced with other policy considerations; and

(7) because of the above conditions and policy considerations, it is the purpose of this Act to reduce the liability exposure and insurance costs of these organizations and their employees and volunteers in order to encourage volunteer services and maximize the resources devoted to delivering these services.

TEX. CIV. PRAC. & REM. CODE ANN. § 84.002 (1987). See also Kahn, *Organizations' Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433, 1435-36 (1985) (volunteering enhances functioning of democratic system by strengthening participation of citizens in their communities).

The Act encourages the states and their political subdivisions, such as cities and counties, to enact similar legislation and awards any complying state a one percent increase in its Federal Social Services Block Grant funds.³⁴ The amount of this "award", however, is insubstantial. For example, in 1987 this amount would be approximately \$3,000,000 in a large state like California, and approximately \$400,000 in a small state like New Hampshire.³⁵ The award provision alone cannot be expected to force states to enact the model legislation. The bill's sponsor, Congressman John E. Porter (R-Illinois), commented that "[the award] is a very modest amount, but a sufficient sum to motivate the states to act."³⁶

One of the more significant features of the Federal bill is that it defines many of the terms which are essential in the area of tort immunity. Under H.R. 911, the term "volunteer" means:

an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation, or any other thing of value in lieu of compensation, for such services (other than reimbursement for expenses actually incurred or honoraria not to exceed \$300 per year for government service), and such term includes a volunteer serving as a director, officer, trustee, or direct service

34. The purpose of and authorization for Federal Social Services Block Grant funds is set forth in Subchapter XX of the Social Security Act of 1975 as follows:

For the purposes of consolidating Federal assistance to States for social services into a single grant, increasing State flexibility in using social service grants, and encouraging each State, as far as practicable under the conditions in that State, to furnish services directed at the goals of—

- (1) achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency;
- (2) achieving or maintaining self-sufficiency, including reduction or prevention of dependency;
- (3) preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating or reuniting families;
- (4) preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care; and
- (5) securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individuals in institutions; there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of this subchapter.

42 U.S.C. § 1397 (1981).

35. 1988 Hearings, *supra* note 33, at 11.

36. *Id.*

volunteer.³⁷

Also, "nonprofit organization" is defined as "any organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code."³⁸ The terms "damage or injury" are defined as including "physical, nonphysical, economic, and non-economic damage."³⁹ The phrase "within the scope of such individual's official functions and duties with the organization or entity"⁴⁰ is used to further circumscribe when the individual volunteer is protected by the act.

As one of many tort reform acts, the federal legislation reflects public dissatisfaction with the tort process as it has developed in the courts.⁴¹ This vexation has been expressed by the state legislatures. In enacting its immunity legislation, the Colorado General Assembly's stated purpose was to:

encourage the provision of services or assistance by persons on a voluntary basis to enhance the public safety rather than to allow judicial decisions to establish precedents which discourage such services or assistance to the detriment of public safety.⁴²

The boundaries of our tort law have previously been established by legislative bodies as well as by the courts.⁴³ The judiciary has never had a monopoly on the creation of tort immunity. Statutes of limitations, for example, which absolutely bar tort victims from bringing suit if the action is not filed within a spec-

37. H.R. 911, *supra* note 1, at § 6(1).

38. *Id.*, *supra* note 1, at § 6(2).

39. *Id.*, *supra* note 1, at § 6(3).

40. *Id.*, *supra* § 4(a)(1). Most likely the drafters intended this phrase to be equivalent to "scope of employment." See *RESTATEMENT (SECOND) OF AGENCY* § 228 (1957).

41. In its findings, the original 1987 version of H.R. 911 expressed the need for such legislation in part because of "the unpredictability of liability awards and doctrines. . . ." This language was excluded from the 1989 draft.

42. *COLO. REV. STAT. § 13-21-116(1)* (1987) (emphasis added).

43. Sovereign immunity has come from both courts and legislatures. For example, in Missouri the doctrine of sovereign immunity was part of the common law until it was abandoned by the court in 1977. See, e.g., *Jones v. State Highway Comm'n.*, 557 S.W.2d 225 (Mo. 1977) (en banc). Then, in 1978, the Missouri General Assembly reinstated the doctrine with certain exceptions. *MO. REV. STAT. § 537.600* (1978). In 1985, the Missouri General Assembly amended the statute to permit suits against governmental entities for "negligent, defective, or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977" as an exception to sovereign immunity.

ified time, are legislative in origin. Bankruptcy, which is also governed by statute, sometimes effectively results in a denial of compensation by protecting the tortfeasor from paying damages.⁴⁴ Incorporation is also a limitation on the tort victim's ability to obtain compensation because the individuals who own the corporation (shareholders) and those who manage it (directors and officers) generally are not personally liable for torts committed by the corporation. Automobile guest statutes can deny recovery to certain specified tort victims.⁴⁵ Tort immunity is often bestowed upon an employer by virtue of workers' compensation legislation.⁴⁶ The preceding examples demonstrate that public policy has influenced the development of tort through legislation, rather than through court decisions.

Volunteers As An Economic Resource

It is impossible to address the magnitude of the need for this federal legislation without discussing the economic aspects and the social phenomena which constitute "volunteerism." Public policy favors volunteer immunity because volunteers have become indispensable to our society. Volunteers have been described as the "Third Sector" of our economy, along with government and business.⁴⁷ In a recent Senate hearing on H.R. 911 it was pointed out that: "This country depends on volunteers to make things work, from town councils, libraries, school boards, fire departments, and hospital boards, to scout troops and little

44. *In Re Johns-Manville Corporation*, 36 Bankr. 727 (S.D. N.Y., 1984). When the Johns-Manville Corporation filed for reorganization under Chapter 11 of the Bankruptcy Code, asbestos-lawsuit plaintiffs contended that Manville was misusing the Bankruptcy Code by attempting to use reorganization to resolve products liability claims. *Id.* at 730. The Bankruptcy Court concluded that liquidation of the company would preclude just compensation of Manville's asbestos claimants. *Id.* at 736.

45. See TEX. CODE ANN. tit. 4, ch. 72 (1985) (liability of motor vehicle owner or operator to guest).

46. 2 S. SPEISER, C. KRAUSE, & A. GANS, *THE AMERICAN LAW OF TORTS* 258 (1985). It is a standard feature of these workers' compensation systems, state and Federal, that, insofar as an employee is covered—as usual with some exceptions—they provide an immunity to the employer within that system, and, as the statutes usually in terms declare and the courts fully implement, the compensation afforded is the exclusive remedy with common law tort damage actions being barred.

Id. at 259 (emphasis in original).

47. *INDUSTRY WEEK* at 13 (Oct. 19, 1981).

league baseball teams."⁴⁸

Volunteers are an important resource. In 1987 forty-five percent of all Americans eighteen or older volunteered in a variety of activities. This means that some eighty million people donated approximately nineteen and a half billion hours of labor,⁴⁹ the dollar value of which has been estimated at \$150,000,000,000.⁵⁰

One attribute common to all volunteers is the giving of "services without any express or implied promise of remuneration."⁵¹ Some volunteers work in traditional formal settings such as hospitals, churches, and schools. Others are engaged in less formal volunteer activities such as organizing a fundraiser to aid a family whose child is hospitalized, assisting an elderly neighbor, or baking a cake for a 4-H group. Volunteering to work for a formal organization typically involves a specific time commitment whereas informal volunteering may involve a more or less flexible or short-term time commitment.

The organizations served by volunteers are numerous and varied. They address the acquisition of knowledge and skills (Association for the Blind, Laubach Literacy International); children and family services (Big Brothers/Big Sisters, Ronald McDonald House); community coordination services (United Way); health services (American Cancer Society, American Heart Association, Arthritis Foundation, March of Dimes); ser-

48. 1988 *Hearings*, *supra* note 33 (testimony of Senator John Melcher at 3). At the May 20, 1988, hearing, Congressman John Porter testified that:

the advancement of volunteer protection statutes is a goal shared by literally hundreds of nonprofit and volunteer-dependent organizations. In the House, I have collected 238 cosponsors on H.R. 911—111 Democrats and 127 Republicans. Almost all of these supporters have signed on as a result of local citizens who contacted them, explained the severity of the problem and requested their support. . . . Volunteers are central to the fabric of our society, to our way of life, and this legislation is a modest attempt to bolster the contribution they make.

Id. at 16 (testimony of Congressman John Porter).

49. *Giving and Volunteering*, *supra* note 3, at 5.

50. *Id.* Of course the total value of contributions volunteers make cannot be measured solely in quantitative terms. For an economic study of the value of the volunteer labor supply, see Menchik & Weisbrod, *Volunteer Labor Supply*, 32 J. PUB. ECON. 159 (1987).

51. BLACK'S LAW DICTIONARY 1413 (5th ed. 1979); WEBSTER'S NEW COLLEGIATE DICTIONARY 1303 (1981). See also Kahn, *Organization's Liability for Torts of Volunteers*, 133 U. PA. L. REV. 1433, 1434 n.9 (1985) for a lengthy discussion of the term "volunteer."

vices to the handicapped (Special Olympics, Spina Bifida Association); international services (World Wildlife Fund, USO); provision of basic needs and economic opportunity (Salvation Army); protection for animals (Humane Societies); youth (Boy Scouts/Girl Scouts, Campfire); and recreation (YMCA).⁵² This variety of volunteer activities suggests the variety of injuries which can occur in the rendering of volunteer services. Only legislation which is broad in scope can effectively address the immunity issue.

Volunteers also work in governmental units. The volunteer work force in the public sector is very large and includes all of the volunteers in schools, courts, and local governments. In 1985, eighteen percent of the total volunteer time was contributed to federal, state, and local government organizations.⁵³ According to one author, in 1982 four thousand people volunteered to work in Orlando, Florida schools; 84,000 people volunteered in the state of New Jersey for fire and emergency squads; and 150,000 citizens participated in police sponsored neighborhood patrols in Philadelphia.⁵⁴ The liability of units of government for torts committed by volunteers, however, is complicated by the theory of governmental immunity.⁵⁵

The largest category of volunteers, almost one-fifth of the population, is oriented toward religious activities such as Sunday school teaching and ushering.⁵⁶ The most common reasons given for volunteering are that people want to do something useful (54%), that they thought they would enjoy the work (34%), or that a family member or friend would benefit (27%).⁵⁷

Volunteering helps not only the beneficiary but also the volunteer. Through volunteer work many young people gain valuable experience which they could not obtain elsewhere. Older volunteers gain the satisfaction of "doing something useful" with their skills. In 1981, more than 250,000 people sixty years of age

52. Federal Coordinating Committee and the Director of OPM, CFC Brochure and Principal Combined Fund Organization Report to Contributors for the 1987/88 Combined Federal Campaign for Springfield and the surrounding area.

53. *Americans Volunteer 1985*, INDEPENDENT SECTOR (with the Gallup Organization), at 4 (1986).

54. Allen, *Volunteers: Two Views*, NATION'S CITIES WEEKLY, at 2 (Feb. 1, 1982).

55. Kahn, *supra* note 51, at 1435 n.12.

56. "QUE PASA?," NUESTRO (December 1981).

57. *Giving and Volunteering*, *supra* note 2, at 6.

and older participated in the federal Older Americans Volunteer Program through its Foster Grandparent Program, the Senior Companion Program, and the Retired Senior Volunteer Program.⁵⁸ In fact, the influx of women into the workplace has shrunk the pool of potential volunteers and increased the demand for older, retired volunteers. By 1983, the number had risen to 350,000.⁵⁹ Thousands more have worked with the Service Core of Retired Executives (SCORE) through the Small Business Administration.

Older Americans have a special interest in the preservation of volunteerism—as both volunteers and beneficiaries. They sometimes are volunteers and occasionally are tort victims. Because of this special position the American Association of Retired Persons (AARP) has commissioned studies on the issue of Volunteer Immunity.⁶⁰

In 1981, the Reagan administration, in pursuing an agenda of cutbacks in federal social assistance, created a dramatic shift of responsibility from the public to the private sector. When federal funding for social-welfare, health, environmental, cultural, housing, and food programs was reduced, the need for volunteer services grew.⁶¹ In 1982, President Reagan announced the formation of a "President's Task Force on Private Sector Initiatives."⁶² As he was leaving office in January, 1989, President Reagan indicated that he has favored private philanthropy over government welfare programs.⁶³ It has been stated that owing to this economic trend:

The volunteer army will have to shoulder greater responsibilities in future years. Federal budget cuts are pinching the nonprofit sector, making it increasingly dependent on volunteers. Independent Sector expects the 1986 tax reform bill to cut donations by another \$11 bil-

58. "Are You Helping Others?," *MODERN MATURITY* (August/September 1981).

59. "The Good a Good Volunteer Can Do," *CHANGING TIMES* 71 (August 1983).

60. See S. McCurley, *supra* note 28. See also A. Goodman, *Immunity from Liability for Volunteers* (March 15, 1988) (unpublished paper prepared for the American Association of Retired Persons).

61. "Our Economy Needs Vital 'Third Sector,'" *INDUSTRY WEEK*, (October 19, 1981).

62. Stokes, *Volunteers: Two Views*, *NATION'S CITIES WEEKLY* (Feb. 1, 1982). Smaller government and less spending has been criticized as a "fatuous" notion of substituting private philanthropy for government servicing of social programs. Kinsley, *Waiting for Lenny*, *HARPERS* (March 1982).

63. Speech by President Reagan, to the Knights of Malta (Jan. 13, 1989).

lion, because the government makes it more expensive to give when it lowers individual tax brackets and charitable contributions can't be deducted by those who don't itemize. Yet in the coming years, many groups will need the attention of volunteers: the growing number of the very old who need looking after, young children in need of day care, and the increasing number of immigrants with limited English ability are only a few.⁶⁴

Unless volunteers are protected from personal tort liability, it will become increasingly difficult for nonprofit organizations to recruit them. A recent Gallup Poll of executives and volunteer board members found that sixteen percent of the board members withheld their services to a charitable organization out of fear of personal liability.⁶⁵ Two percent of the board members surveyed had actually been sued in the course of volunteering for a not-for-profit organization.⁶⁶ The Gallup Study concluded that "while the number of organizations reporting problems with liability risk is not great, concern for liability is common."⁶⁷ The study also found that forty-nine percent of the volunteer board members felt that fewer people would be willing to volunteer to serve on boards of directors for this reason.⁶⁸ This is the true impetus for volunteer immunity legislation—that is, the perception of a crisis in this "Third Sector" of the economy.

How volunteers and nonprofit organizations perceive the "liability crisis" is just as important as the objective reality. The perception of risk is very real and it actually does discourage potential volunteers from donating their services.⁶⁹ In its legislative findings, H.R. 911 specifically recognized that the perception of risk is a real problem. H.R. 911 provides:

64. de Combray, *Volunteering in America*, AMERICAN DEMOGRAPHICS, at 52 (March 1987). Seventy-one percent of the respondents in a 1987 Gallup Organization survey believed that "charities are needed more today than five years ago." *Giving and Volunteering*, *supra* note 3, at 10.

65. Gallup Organization, *The Liability Crisis and the Use of Volunteers by Non-Profit Associations*, at 31 (January, 1988) [hereinafter *Liability Crisis*].

66. *Id.* at 32.

67. *Id.* at 4.

68. *Id.* at 30.

69. Interview with Gene Waite, Director of Public Relations for the Greene County, Missouri, Chapter of the American Red Cross, in Springfield, Missouri (September 23, 1988). "Recruitment and maintaining volunteers is going to become as competitive as obtaining or securing the charity dollar." *Id.*

(1) within certain States, the willingness of volunteers to offer their services has been increasingly deterred by a *perception* that they thereby put personal assets at risk in the event of liability actions against the organization they serve;

(2) as a result of this *perception*, many nonprofit public and private organizations and governmental entities, including voluntary associations, local governments, foundations, and other civic programs, have been adversely affected through the withdrawal of volunteers from boards of directors and service in other capacities.⁷⁰

Congressman Porter has stated that the passage of the Volunteer Protection Act would send a message to volunteers that government appreciates volunteers' contributions to our country's welfare and their dedication to helping others, Volunteers must not feel exposed to frivolous and unwarranted claims that they have caused harm.⁷¹

Nonprofit organizations are caught in a crisis. The 1988 Gallup Poll found that the average cost of liability insurance increased by 155% in 1987.⁷² Five percent of the organizations had been sued within the preceding five years,⁷³ and about one in four of the organizations surveyed had been sued at some point in time.⁷⁴

Why should state legislatures not assist nonprofit organizations by enacting volunteer immunity legislation to insure an adequate supply of volunteers? The most powerful argument against any grant of volunteer immunity is that it has the potential to deprive an injured party of a remedy.

Although one of the goals of tort law is to compensate victims and to allocate responsibility for their losses, however, tort law never has held out a remedy for all victims. For example, a duty must exist before liability may be imposed. A skillful swimmer can stand on a dock and watch a child drown without incurring a legal duty to attempt a rescue. While the swimmer would be judged morally responsible by most persons, the victim would lack a legal remedy.

Nor has tort law ever guaranteed that a successful plaintiff

70. HR. 911, *supra* note 1, §§ 2(a)(1), (2) (emphasis added).

71. 1988 Hearings, *supra* note 33.

72. *Liability Crisis*, *supra* note 65, at 8.

73. *Id.* at 13.

74. *Id.*

would actually receive the amount of compensation awarded by the court. If the defendant is poor and has no insurance, he is, for all practical purposes, immune. Only in rare circumstances are individuals required to carry insurance, and even when insurance coverage is mandatory, not everyone will obtain it. So, "guaranteed compensation does not exist." Under H.R. 911, a tort victim would have to look to the nonprofit entity rather than to the volunteer for compensation.⁷⁵ H.R. 911 allows states, in their discretion, to impose a condition that:

[P]rotection from liability shall apply only if the organization or entity provides a financially secure source of recovery for individuals who suffer injury as a result of actions taken by a volunteer on behalf of the organization or entity.⁷⁶

H.R. 911 does not give protection to all volunteers. Certain provisions in the proposed federal legislation are designed to prevent abuse. For example, H.R. 911 denies protection to those individuals: 1) whose torts may be considered "willful and wanton misconduct"; 2) whose actions are not within the scope of their official functions and duties with the organization or entity; or 3) whose actions are not carried out in good faith.⁷⁷

First, under H.R. 911, immunity would be denied to an individual where the injury was caused by his "willful and wanton misconduct."⁷⁸ This term has been defined differently by different courts. A typical definition states that willful and wanton misconduct is "a course of action which shows either a deliberate intention to harm or an utter indifference to, or conscious disregard for, the safety of others."⁷⁹ While injuries may be the

75. Arguably, the charitable institution is in a better position to bear the burden of compensating the victim than is the volunteer. The charity often has greater financial resources than its volunteers (particularly in the case of a governmental entity). From an insurance standpoint, the charity rather than its volunteers is the more logical entity to negotiate for liability insurance. Since a charity's insurance rates may ultimately hinge on its success in eliminating negligence, it is the logical risk manager.

76. H.R. 911 4(d)(5). "A financially secure source of recovery may be an insurance policy within specified limits, comparable coverage from a risk pooling mechanism, equivalent assets, or alternative arrangements that satisfy the State that the entity will be able to pay for losses up to a specified amount. Separate standards for different types of liability exposure may be specified." *Supra* note 1, at H.R. 911 4(d)(5).

77. H.R. 911, *supra* note 1, at § 4(a).

78. *Id.*, *supra* note 1, at § 4(a)(2).

79. *Rabel v. Ill. Wesleyan Univ.*, 161 Ill. App.3d 348, 514 N.E.2d 552, 558, 112 Ill. Dec. 889, 895 (4th Dist., 1987). *See also* *Burnett v. City of Adrian*, 414 Mich. 448, 448

same from case to case motive and intent of defendants can vary tremendously. H.R. 911 would deny protection to volunteers whose conduct rose to more serious levels of wrongfulness.

Second, "nonprofit organization" is defined in the legislation as "any organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code."⁸⁰ The Act would not grant immunity to individuals acting on their own.⁸¹ This provision accomplishes at least two things:

- (1) it recognizes the fact that formal organizations are often better equipped to manage risk than individual volunteers, and,
- (2) since the organized entity itself can still be sued under the vicarious liability theory of *respondeat superior*, the entity is likely to act responsibly and adopt a sound risk management program.

Most organizations train their own volunteers and oversee their activities. In fact, with its aggregate experience the organization is in a better position than the volunteer to understand and eliminate or minimize the risk involved with its volunteers' activities. As a result, under H.R. 911, the nonprofit entity would determine the eligibility of volunteers for immunity. The entity, for all practical purposes, becomes the ultimate "risk manager." Since the victim of a volunteer's negligent conduct can still look to the organization for redress, it is reasonable to infer that nonprofit organizations will act prudently in recruiting, training, and monitoring their volunteer workforce.

Finally, the "good faith" requirement of H.R. 911 provides one more hurdle which may further insure that the volunteer who is protected actually deserves it. Once again, the statute

326 N.W.2d 810, 811 ("Willful and wanton misconduct" is made out only if conduct alleged shows intent to harm or, if not that, such indifference to whether harm will result as to be equivalent of willingness that does, and "willful and wanton misconduct" is not high degree of carelessness); *Tranby v. Brodock*, 348 N.W.2d 458 (S.D. 1984). "Willful and wanton misconduct" means something more than negligence; it describes conduct which transcends negligence and is different in kind and characteristics; it is conduct which partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong." *Id.* at 461; *Morgan v. S. Pac. Transp. Co.*, 37 Cal.App.3d 1006, 1011, 112 Cal.Rptr. 695, 698 (1974) (an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care).

80. H.R. 911, *supra* note 1, at § 6(2).

81. For example, a person who helps an elderly neighbor to do chores would not be entitled to immunity.

looks to the volunteer's intent.

Under the proposed legislation, the states are also permitted to impose additional restrictions on volunteer protection from tort liability. Individual states may impose the condition that "the organization or entity must adhere to risk management procedures, including mandatory training of volunteers."⁸² The Act further permits states to preserve the principle of *respondeat superior* by allowing this theory to coexist with volunteer immunity.⁸³ It also allows the states to exclude from protection a volunteer who "was operating a motor vehicle for which a pilot's license is required."⁸⁴ Last, a state may deny volunteer immunity where an officer of a state or municipality brings the suit.⁸⁵

H.R. 911 and similar state legislation would impact volunteerism and tort law in at least three major respects. First, nonprofit organizations would be allowed to offer assurance to their volunteers that if volunteers exercise reasonable care, they will not be held personally liable for personal injury or property damage. Studies have shown that this will have a positive impact on the nonprofit sectors's ability to recruit and retain volunteers. Second, in most instances lawsuits would be brought against the nonprofit entity rather than against the individual volunteer. Third, since the nonprofit organizations themselves would be the ultimate defendants in most tort actions, it can be expected that they would be more conscientious in their risk management programs.

In practice, the Volunteer Protection Act will not unfairly limit the ability of tort victims to recover for injuries received as recipients of services provided by volunteers working for nonprofit organizations. Since the threat of personal tort liability of volunteers is largely perceptual rather than real, the major impact of the Act will be to lessen the fear of personal liability,⁸⁶

82. H.R. 911, *supra* note 1, at § 4(d)(1).

83. *Id.*, *supra* note 1, at § 4(d)(2).

84. *Id.*, *supra* note 1, at § 4(d)(3). This provision, if included in state legislation, would deny immunity to volunteers in a great number of instances.

85. *Id.*, *supra* note 1, at § 4(d)(4).

86. H.R. 911 may not eliminate entirely the volunteer's need to retain an attorney in order to establish that the volunteer comes within the protection of the legislation. For example, the volunteer/defendant will still have to show that his conduct was not "willful or wanton" and that he was working for a recognized organization at the time of the alleged tort. Thus, even with this legislation, the volunteer is not relieved of all risk, and he may still be faced with the costs of hiring an attorney and defending himself at a

thereby eliminating the recruiting problem which nonprofit entities currently face.

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