Michigan Law Review

Volume 36 | Issue 3

1938

MUNICIPAL CORPORATIONS - TORT LIABILITY - APPLICABILITY OF STATUTORY NOTICE REQUIREMENT TO INFANTS

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Torts Commons

Recommended Citation
Michigan Law Review, *MUNICIPAL CORPORATIONS - TORT LIABILITY - APPLICABILITY OF STATUTORY NOTICE REQUIREMENT TO INFANTS*, 36 MICH. L. REV. 503 (1938).
Available at: https://repository.law.umich.edu/mlr/vol36/iss3/21

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MUNICIPAL CORPORATIONS — TORT LIABILITY — APPLICABILITY OF STATUTORY NOTICE REQUIREMENT TO INFANTS — A statute [1] provided "No action shall be maintained by any person . . . against any city" unless the person injured filed notice of claim within three months after the injury. The plaintiff, an infant sixteen years of age, was injured when he fell into an unlighted, unguarded opening in a sidewalk at the city's memorial building, which the city had rented for the evening in question to a boy scout group of which

[1] Kan. Gen. Stat. (1935), § 12-105.

plaintiff was a member. No statutory notice was filed. The court *held* the statute created a mandatory condition precedent, applying to infants as well as adults, failure to comply with which barred the plaintiff's claim. The court refused to restrict the operation of the statute to claims arising from the exercise of a governmental function, on the ground that exceptions to the general language of the statute must be made by the legislature. *Thomas v. City of Coffeyville*, (Kan. 1937) 66 P. (2d) 600.

Statutes similar to the Kansas statute have been generally upheld as constitutional,[2] the purpose being to bar stale demands and to give the city opportunity to investigate and to avoid needless litigation where legal liability is disclosed.[3] Whether the city was exercising a governmental or proprietary function at the time of the alleged negligence is usually not considered, the courts holding that since there is no general law of municipal corporations, the city's tort liability is controlled by the legislature.[4] While the statute is uniformly construed as establishing a condition precedent to plaintiff's right of action,[5] the courts are divided on the question whether there is an implied exception in favor of a plaintiff who has been unable to comply because of mental or physical incapacity lasting throughout the statutory period. The New York court, while admitting the legislative power to impose conditions on the city's tort liability,[6] interprets the legislative intent in light of the maxim "the law does not seek to compel impossibilities" and arrives at the conclusion that the statute was not intended to apply to cases of incapacity.[7] Under this interpretation, where compliance with the condition is impossible because of plaintiff's physical or mental condition, failure to comply is not a defense where notice is given within a reasonable time after removal of the disability.[8] The courts which follow this rule exempt infants where infancy amounts to a physical or mental

[2] 32 L. R. A. (N. S.) 350 (1911); 36 L. R. A. (N. S.) 1136 (1912); 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., §§ 2630, 2886 et seq. (1937).

[3] 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., § 2892 (1937).

[4] Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345 (1919); Collins v. City of Memphis, (D. C. Tenn. 1936) 16 F. Supp. 204; 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., 1279 (1937); 4 DILLON, MUNICIPAL CORPORATIONS, § 1613 (1911). *Contra*: D'Amico v. City of Boston, 176 Mass. 599, 58 N. E. 158 (1900); Henry v. City of Lincoln, 93 Neb. 331, 140 N. W. 664 (1913).

According to the majority view, it seems proper to distinguish the city acting even in proprietary capacity from a private corporation, since the city is not essentially in a business for profit and the same considerations that make notice desirable when the city acts in its governmental capacity apply when the city acts as proprietor.

[5] 4 DILLON, MUNICIPAL CORPORATIONS, § 1613 (1911); 6 McQUILLIN, MUNICIPAL CORPORATIONS, 2d rev. ed., 1278 (1937); 43 C. J. 1183 ff. (1927).

[6] Gold v. City of Kingston, 210 App. Div. 523, 206 N. Y. S. 735 (1924); MacMullen v. City of Middleton, 187 N. Y. 37, 79 N. E. 863 (1907).

[7] Murphy v. Village of Fort Edward, 213 N. Y. 397, 107 N. E. 716 (1915); Forsyth v. City of Oswego, 191 N. Y. 441, 84 N. E. 392 (1908).

[8] Winter v. City of Niagara Falls, 190 N. Y. 198, 82 N. E. 1101 (1907); Forsyth v. City of Oswego, 191 N. Y. 441, 84 N. E. 392 (1908); Walden v. City of Jamestown, 178 N. Y. 213, 70 N. E. 466 (1904); cases collected in 31 A. L. R. 619 (1924); 43 C. J. 1208 (1927).

incapacity.[9] The Illinois court excuses infants on the ground that since the infant is recognized in the law as a person devoid of responsibility, the legislature enacted the statute in contemplation of settled rules of law and presumably intended to exempt infants.[10] The courts have frequently said that to require infants and persons mentally or physically incapacitated for the entire period to give notice denies due process of law to such persons.[11] The reasoning in the instant case, in accordance with that of cases in other jurisdictions which adopt a strict construction of the statute, proceeds upon the theory that municipal liability for tort is entirely statutory, with the result that the legislature can limit the liability or remove it without depriving a plaintiff of any right.[12] The strict construction rule is to be commended in that the courts are relieved from the necessity of reading an ambiguity into fairly explicit statutory language, while the remedy is properly left to the legislature. Finally, the question is one of policy whether the courts should attempt to relieve against harsh results where there is no express exemption in the statute, or whether notice to the city is so desirable from the standpoint of the public as to outweigh the plaintiff's loss in a particular case. Granting that the strict construction rule may work hardship in some cases, the rule is no more harsh than the rule that ignorance of the law is no excuse. As a practical matter, *quaere* whether substantial harm will be done if the court refuses to make the exception. It has been said that while technically the infant cannot sue, "in fact and in practice, infants, through their guardians and next friends, are commonly the most diligent and persistent of suitors, and the instances are few where any meritorious right is allowed to slumber." [13]

[9] See Russo v. City of New York, 258 N. Y. 344, 179 N. E. 762 (1932), where a fourteen-year-old infant was held excused as a matter of law, since he was physically and mentally unable to comprehend and comply with the statute.

[10] McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476 (1918).

[11] 31 A. L. R. 619 at 625 (1924).

[12] Peoples v. City of Valparaiso, 178 Ind. 673, 100 N. E. 70 (1912); McCollum v. City of South Omaha, 84 Neb. 413, 121 N. W. 438 (1909); Baker v. Town of Manitou, (C. C. A. 8th, 1921) 277 F. 232; Dechant v. City of Hays, 112 Kan. 729, 212 P. 682 (1923); City of Birmingham v. Weston, 233 Ala. 563, 172 So. 643 (1937); Robinson v. City of Memphis, (Tenn. 1937) 105 S. W. (2d) 101; Spencer v. City of Calipatria, 9 Cal. App. 267, 49 P. (2d) 320 (1935). See additional cases collected in 31 A. L. R. 619 (1924).

[13] Morgan v. City of Des Moines, (C. C. A. 8th, 1894) 60 F. 208 at 209-210.