

Michigan Law Review

Volume 33 | Issue 1

1934

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Recommended Citation

MUNICIPAL CORPORATIONS - MUNICIPAL RESPONSIBILITY FOR THE TORTS OF POLICEMEN, 33 MICH. L. REV. 131 (1934).

Available at: <https://repository.law.umich.edu/mlr/vol33/iss1/16>

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MUNICIPAL CORPORATIONS — MUNICIPAL RESPONSIBILITY FOR THE TORTS OF POLICEMEN — *E*, standing near the scene of a holdup in the Bronx, was shot by a stray bullet from the gun of a policeman engaged in pursuing several highwaymen. The Municipal Assembly of New York City enacted in 1927 an ordinance¹ providing that the Board of Estimate is authorized to make an award of damages to such innocent bystanders when injured by policemen. *E* received an award of \$6,740 from the Board for injuries suffered. Upon the Comptroller's refusal to pay it without a judicial declaration of its legality, *E* sued out a writ of mandamus. It was held that *E* was entitled to the award. *Evans v. Berry, City Comptroller*, 262 N. Y. 61, 186 N. E. 203 (1933).

In discussing the liability of a municipality for the torts committed by its agents, the courts distinguish between governmental and proprietary functions of the city. The principle, generally stated, is that a municipal corporation is not liable in a private action for injuries resulting from the exercise of a governmental function,² but it is under a common law liability for the torts of its agents while performing proprietary duties;³ it is uniformly held that a city acts in its governmental capacity in the maintenance of its fire and police departments, and that the city is immune from liability for the tortious acts of its firemen and policemen.⁴ Some legislatures, realizing the harshness of the operation of this distinc-

¹ New York Local Laws (1927), p. 83. "Section 1. The board of estimate and apportionment is hereby authorized and empowered, in its discretion, to make an award to a person who has been or hereafter shall be injured by a police officer while such officer is engaged in arresting any person or in retaking any person who has escaped from legal custody or in executing any legal process. Such award shall be of such amount as the Board of Estimate and Apportionment shall deem just and equitable."

² *Johnston v. City of Chicago*, 258 Ill. 494, 101 N. E. 960 (1913); *Harris v. District of Columbia*, 256 U. S. 650, 41 Sup. Ct. 610 (1920); *Wilcox v. City of Rochester*, 190 N. Y. 137, 82 N. E. 1119 (1907); 4 DILLON, MUNICIPAL CORPORATIONS, 5th ed., sec. 1656 (1911); 19 R. C. L. 1109, 1111 (1917); R. C. L. Perm. Supp., pp. 4759, 4760 (1929).

³ *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N. E. 164 (1922); *Board of Education of Cincinnati v. McHenry*, 106 Ohio St. 357, 140 N. E. 169 (1922); *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760 (1906).

⁴ *Wilcox v. City of Chicago*, 107 Ill. 334, 47 Am. Rep. 434 (1883); *Stedman v. City and County of San Francisco*, 63 Cal. 193 (1883); see 19 R. C. L. 1117-1119 (1917); 7 R. C. L. Perm. Supp., pp. 4762, 4763 (1929).

tion, and recognizing that the modern tendency is against "non liability,"⁵ have passed statutes which amount to an assumption of community liability or waiver of municipal immunity.⁶ New York, in fact, has gone beyond the assumption of liability for negligence merely, but has assumed liability where the operation of a public service, regardless of fault, resulted in an injury to an innocent individual.⁷ The objection was made in the instant case that this was not a disbursement of funds for a public purpose, but the court stated that an assumption of liability does not constitute a gift or gratuity to the injured person so long as it is the legitimate recognition of an equitable claim, and as the Court of Appeals of New York has recognized that community liability for such injuries represents a moral and equitable obligation,⁸ and in that the award was for a city purpose in giving protection to people who are exposed to the risk of injury when on city streets, the objection that this was a gift seems untenable. In the light of increasing risks and complexities to which human beings are exposed in present day life, the decision herein reached seems sound.⁹

I. W. C.

⁵ *Augustine v. Town of Brant*, 249 N. Y. 198, 163 N. E. 732 (1928); See generally, 14 CORN. L. Q. 351 at 355 (1929); Borchard, "Government Liability in Tort," 34 YALE L. J. 1, 129, 229 (1924-1925); 36 YALE L. J. 1, 757, 1039 (1926-1927); 28 COL. L. REV. 577, 734 (1928); Doddridge, "Distinction Between Governmental and Proprietary Functions of Municipal Corporations," 23 MICH. L. REV. 325 (1925).

⁶ Cal. Civ. Code (Deering 1931), sec. 1714- $\frac{1}{2}$, p. 661; Conn. Gen. Stat. (1930), c. 319, secs. 5988, 5989; Mich. Comp. Laws (1929), sec. 237; Wis. Stat. (1931), sec. 66.095.

⁷ See Judge Cardozo in *People v. Westchester County Nat. Bank*, 231 N. Y. 465 at 468, 132 N. E. 241 at 248 (1921); and 16 CORN. L. Q. 359 at 361 (1931).

⁸ *Williamsburgh Savings Bank v. State*, 243 N. Y. 231, 153 N. E. 58 (1926).

⁹ See comment in 42 YALE L. J. 241 (1932).