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Municipal Corporations-Liability in Tort-Prospective Judicial Abrogation of the Sovereign Immunity Concept

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MUNICIPAL CORPORATIONS—LIABILITY IN TORT—PROSPECTIVE JUDICIAL ABROGATION OF THE SOVEREIGN IMMUNITY CONCEPT—Plaintiff's decedent was killed by a fall down the elevator shaft of a building owned and maintained by the City of Detroit. Plaintiff alleged that defendant city negligently failed to protect and enclose the shaft, in violation of its own ordinances, and that such failure was the proximate cause of her husband's death. The city moved to dismiss, claiming that it was engaged in a governmental function and therefore was immune from tort liability. On appeal from an order dismissing the complaint, *held*, affirmed by an evenly divided court. However, a majority of the court prospectively overruled the judicial doctrine of governmental immunity from ordinary torts. *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

The principal case is representative of a growing trend on the part of state courts and legislatures to reach a new compromise between the

common-law concept of sovereign immunity[1] and the belief that the risk of wrongful injury should not be borne by the individual but by society as a whole.[2] Interaction of these conflicting views has placed the law of sovereign immunity in a state of confusion, for while some jurisdictions rigidly adhere to the immunity rule, others have made inroads upon it through piecemeal imposition of liability. Many courts, for example, have in recent years liberally construed legislative enactments empowering specific governmental bodies "to sue and be sued."[3] Whereas formerly these provisions had been interpreted to waive immunity of the sovereign only from suit and not liability,[4] now immunity from liability is also held to have been waived.[5] Judicial attempts have also been made to distinguish those functions in which the municipal body is acting in a governmental capacity from those in which its activities are proprietary in nature, and as such are not granted sovereign immunity.[6] However, no satisfactory criteria for the distinction have been devised other than vague and general guides,[7] and, as has been suggested,[8] the outcome desired in a particular case often influences the classification employed. Another distinction has been that made between contract and tort actions, on the theory that an award of contract damages indirectly benefits the governmental body by encouraging persons to contract with it, while a tort recovery yields no

1 Russel v. Men of Devon, 2 Durn. & East. 667, 100 Eng. Rep. 359 (K.B. 1788). See also Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954).

2 See Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

3 Linger v. Pennsylvania Turnpike Comm'n, 158 F. Supp. 900 (W.D. Pa. 1958); Lowes v. Pennsylvania Turnpike Comm'n, 125 F. Supp. 681 (M.D. Pa. 1954); Sayreville v. New Jersey Highway Authority, 67 N.J. Super. 271, 170 A.2d 523 (1961). See also Annot., 62 A.L.R.2d 1222 (1958).

4 Petty v. Tennessee-Missouri Bridge Comm'n, 254 F.2d 857 (8th Cir. 1958); Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958); Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961); Wilson v. State Highway Comm'r, 174 Va. 82, 4 S.E.2d 746 (1939).

5 *E.g.*, St. Julian v. State, 82 So. 2d 85 (La. Ct. App. 1955); Ouzts v. State Highway Dep't, 161 S.C. 21, 159 S.E. 457 (1931).

6 Bettencourt v. State, 123 Cal. App. 2d 60, 266 P.2d 201 (1954); People v. Superior Court, 168 P.2d 177 (Cal. Dist. Ct. App. 1946), *peremptory writ of prohibition denied*, 29 Cal. 2d 754, 178 P.2d 1 (1947); Martinson v. City of Alpena, 328 Mich. 595, 44 N.W.2d 148 (1950); Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313 (1956); Gotcher v. State, 106 S.W.2d 1104 (Tex. Ct. Civ. App. 1937).

7 Daszkiewicz v. Detroit Bd. of Educ., 301 Mich. 212, 3 N.W.2d 71 (1942). See generally Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942). In 2 HARPER & JAMES, TORTS § 29.6, at 1621 (1956), the following is submitted as a test for distinguishing governmental from proprietary functions: "(1) whether the function is allocated to the municipality for its profit or special advantage or whether for the purpose of carrying out the public functions of the state without advantage to the city, and (2) whether the function is one historically performed by government."

8 See Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 43 (1949).

such "advantage."[9] A "nuisance" theory,[10] and an "active wrongdoing" test[11] have also carved out limited exceptions to the sovereign immunity rule.

But the principal case and similar decisions in Illinois,[12] California,[13] and Florida[14] have attempted to lay aside these multifarious distinctions in favor of a judicial abrogation of the ancient common law immunity rule. In so doing, new problems are posed, problems not encountered under a rule of immunity. Perhaps the most significant of these is the question of what limits, if any, should be placed upon the liability of the formerly immune sovereign and its subordinates. The holding in the principal case has extended liability, unlimited in amount, not only to the City of Detroit, but to every municipal corporation in Michigan regardless of size. From what appears, it is conceivable that governmental bodies may also be held accountable for the intentional torts of their employees and agents. In short, even though the decision expressly exempts from liability discretionary governmental functions, many of the other traditional safeguards on liability have been abandoned despite the fact that experience indicates some restraint is required for the protection of public funds, especially those of the smaller community.[15] In addition, the increased liability may necessitate the establishment of appropriate administrative facilities or perhaps an independent tribunal to administer liability claims effectively. Without a resolution of these problems it will be difficult for the broad liability rule to serve as a practicable solution. Thus, a reaction from the legislature or the judiciary is likely to follow which will either implement the rule and supply the necessary safeguards, or restore the

9 Chapman v. State, 104 Cal. 690, 38 Pac. 457 (1894); Bush v. State Highway Comm'n, 329 Mo. 843, 46 S.W.2d 854 (1932); Campbell Bldg. Co. v. State Road Comm'n, 95 Utah 242, 70 P.2d 857 (1937).

10 See Capozzi v. Waterbury, 115 Conn. 107, 160 Atl. 435 (1932); Windle v. City of Springfield, 320 Mo. 459, 8 S.W.2d 61 (1928); Oklahoma City v. Tytenicz, 171 Okla. 519, 43 P.2d 747 (1935).

11 Casale v. Housing Authority, 42 N.J. Super. 52, 125 A.2d 895 (1956). See also Repko, *supra* note 7, at 223.

12 Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

13 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961).

14 Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). See also Annot., 60 A.L.R.2d 1193 (1958).

15 See Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934). Opponents of the immunity rule, however, contend that liability insurance affords at a fixed, predictable cost both protection from overwhelming liability and the insurer's services in defending suits against the governmental entity. See Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588. See also Leflar & Kantrowitz, *supra* note 1, at 1413. Support for this view is evidenced by the fact that statutes in some states expressly waive governmental immunity to the extent that such liability is within the coverage of a policy of insurance. *E.g.*, Ford v. City of Caldwell, 79 Idaho 499, 321 P.2d 589 (1958); Villars v. City of Portsmouth, 100 N.H. 453, 129 A.2d 914 (1957); Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936).

immunity doctrine; for such has been the experience in all three of the states whose judiciaries purported to establish a broad rule of liability.

In subsequent decisions, the courts themselves proved reluctant to give full force and effect to their prior decisions. The Florida court refused to extend liability beyond the scope of its original decision,[16] which abolished only municipal immunity, leaving the state and its agencies immune as before except where liability was imposed by statute.[17] Nor would the Florida court extend liability to render municipal corporations accountable for the intentional torts of their employees.[18] In California, the decision purportedly overruling sovereign immunity[19] was subsequently limited to apply only to the torts of agents who acted in a ministerial capacity.[20] So also in Michigan, the ruling of the principal case was later held to withdraw immunity only from municipal corporations.[21]

Although the judiciary may work to temper the liability rule, a comprehensive solution cannot be reached without appropriate legislative implementation. For the judiciary lacks the facilities for an examination of the social, economic and political considerations which delineate the outer limits of liability. Nor can the judiciary provide for uniform administrative facilities and procedures, maximum amounts of recovery, the creation of a liability fund, or other provisions which the added liability may prove desirable.[22] These are properly legislative functions. So also, authorization for the procurement of liability insurance, now a practical necessity for the smaller community with a narrow tax base, is a matter usually reserved to the legislature.[23] These considerations led the California legislature to re-enact the doctrine of governmental immunity from tort liability as a rule of decision in order to allow itself time to draft appropriate legislation and define certain areas in which immunity would continue to exist.[24] So also in Illinois, a Torts Law Commission was created[25] to recommend legislative change where necessary, and to consider the compilation in one code of all laws pertaining to governmental tort lia-

16 Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

17 Moreno v. Aldrich, 113 So. 2d 406 (Fla. Dist. Ct. App. 1959).

18 Middleton v. City of Fort Walton Beach, 113 So. 2d 431 (Fla. Dist. Ct. App. 1959).

19 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961).

20 Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465 (1961).

21 McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961).

22 See Justice Schauer's dissenting opinion in Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961).

23 Maffei v. Incorporated Town of Kemmerer, 338 P.2d 808 (Wyo. 1959).

24 CAL. CIV. CODE § 22.3.

25 Ill. Laws 1961, S. Bill No. 229. See also ILL. ANN. STAT. ch. 34, § 301.1; ch. 57½, § 3a; ch. 105, §§ 12.1-1, 333.2a (Smith-Hurd Supp. 1961), where immunity was reinstated by legislative enactment to counties and certain park and forest preserve districts.

bility. Such action exemplifies the special capacity of the legislature specifically to define and condition the terms of liability.[26]

The model example of such combined legislative and judicial action achieving a significant abrogation of immunity is that set by New York, which in 1929 adopted a Court of Claims Act abolishing sovereign immunity from both suit and liability, and establishing a Court of Claims to hear and determine all claims against the state.[27] Such rule has been refined by subsequent legislative enactments and judicial interpretation[28] over a period of thirty years to provide a comprehensive pattern of tort liability.[29]

The lesson to be drawn from the New York solution is that it will be difficult for the doctrine advanced in the principal case to realize fruition unaltered by subsequent judicial refinement and legislative implementation.[30] However, the court, having taken action in an area often thought to be one of legislative prerogative,[31] does impel legislative consideration of the problem of sovereign immunity in a new light. In doing so, it poses a challenge to the legislature to provide the necessary safeguards and a suitable procedural framework for the administration of tort liability,[32] a challenge now, more than ever, likely to evoke response by way of legislative action, as those interests which formerly enjoyed immunity and opposed the imposition of complete tort liability will undoubtedly be more receptive to legislation intended to strike a compromise.

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[26] Strauss v. Decatur Park Dist., 177 F. Supp. 881 (S.D. Ill. 1959); Miller v. City of Chicago, 25 Ill. App. 2d 56, 165 N.E.2d 724 (1960); Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952).

[27] N.Y. CT. CL. ACT § 8. See also Vt. Laws 1961, S. Bill No. 124, by which Vermont enacted a statutory scheme of similar import.

[28] New York courts have held that this statute swept away the derivative immunity of the state's political subdivisions in Holmes v. County of Erie, 266 App. Div. 220, 42 N.Y.S.2d 243 (1943), *aff'd*, 291 N.Y. 798, 53 N.E.2d 369 (1944); and of municipalities in Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[29] Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 5 N.Y.S.2d 265 (1958). See also Lloyd, *Municipal Tort Liability in New York, A Legislative Challenge*, 23 N.Y.U.L. REV. 278 (1948).

[30] See, *e.g.*, CAL. GOV'T CODE § 53051; CAL. VEHICLE CODE § 17001; ILL. STAT. ANN. ch. 24, §§ 1-13 (Smith-Hurd Supp. 1961); N.Y. MUNIC. LAW § 50a; OHIO REV. CODE ANN. § 701.02 (Page 1953); WIS. STAT. ANN. § 101.06 (Supp. 1961).

[31] See Nelson v. Maine Turnpike Authority, 157 Me. 174, 170 A.2d 687 (1961); Banas v. City of Syracuse, 204 Misc. 201, 125 N.Y.S.2d 490 (Sup. Ct. 1953).

[32] See Borchard, *supra* note 15.