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Municipal Corporations - Waiver of Immunity to Suit by Purchase of Liability Insurance

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MUNICIPAL CORPORATIONS—WAIVER OF IMMUNITY TO SUIT BY PURCHASE OF LIABILITY INSURANCE—The City of Knoxville owned and operated a municipal airport under authority of a state statute which permitted a municipality to acquire, maintain, and operate a municipal airport in its governmental capacity, and which barred suits against the municipality with respect to its operation of the airport.[1] The city carried a policy of liability insurance covering it in the ownership and operation of the airport. Plaintiff was injured by a fall

[1] 3 Tenn. Code Ann. (Williams, 1942 Replacement) §§2726.13, 2726.22.

at the airport terminal building, and instituted a negligence action against the city. The city moved for dismissal, relying upon the immunity given it by the statute. *Held,* motion to dismiss overruled. The city waived its immunity to suit to the extent of the insurance carried by it at the time of the accident. *Bailey v. City of Knoxville,* (D.C. Tenn. 1953) 113 F. Supp. 3.

According to a well-established though often condemned[2] common law doctrine, a municipal corporation is liable only for torts committed by its agents in the performance of proprietary, corporate, ministerial, or private functions, and is immune to tort liability for wrongs committed in the performance of governmental or public functions.[3] This immunity generally cannot be waived without the authorization of the state legislature.[4] In many states the legislature has restricted the area of immunity,[5] but such legislative modifications have affected only a relatively few of the immune functions of municipal corporations in the United States. Interesting questions are posed, therefore, when a municipality, with or without statutory authorization, has taken out a liability insurance policy covering it and its agents. The few jurisdictions which have faced this problem have held almost unanimously that such protection does not operate to waive the common law immunity, even pro tanto.[6] The usual theory behind such decisions is that a municipal corporation has no power to waive its immunity by its own act,[7] or, if the insurance policy has been purchased under statutory authorization, that no waiver of immunity will be implied from such authorization.[8] However, Tennessee,[9] and possibly Kentucky,[10] have

[2] The best known criticism is that found in Borchard, "Government Liability in Tort," 34 YALE L.J. 129, 229 (1924, 1925). See also HARPER, TORTS §295 (1933), and the many articles cited in Repko, "American Legal Commentary on the Doctrines of Municipal Tort Liability," 9 LAW AND CONTEM. PROB. 214 (1942).

[3] See 18 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., c. 53 (1950). In South Carolina, however, immunity is granted without regard to the distinction between corporate and government functions. Looper v. City of Easley, 172 S.C. 11, 172 S.E. 705 (1934).

[4] Adams v. New Haven, 131 Conn. 552, 41 A. (2d) 111 (1945); Stephenson v. Raleigh, 232 N.C. 42, 59 S.E. (2d) 195 (1950); Boice v. Bd. of Education of Rock District, 111 W.Va. 95, 160 S.E. 566 (1931). But see Matter of Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933) (city permitted to waive its immunity and accept a liability based upon a moral obligation).

[5] E.g., 23 N.Y. Consol. Laws (McKinney, 1942) §§50-a to 50-c; Cal. Gen. Laws (Deering, 1944) No. 5619; Ohio Rev. Code (Baldwin, 1953) §701.02. See the proposed statutes in Borchard, "Report of the Committee on Municipal Tort Liability," 7 AM. MUNIC. L. REV. 250 (1942).

[6] Kesman v. School District of Fallowfield Twp., 345 Pa. 457, 29 A. (2d) 17 (1942); Rittmiller v. School District No. 84, (D.C. Minn. 1952) 104 F. Supp. 187; Hummer v. School City of Hartford City, (Ind. 1953) 112 N.E. (2d) 891; Stephenson v. Raleigh, note 4 supra; Utz v. Bd. of Education of Brooks County, 126 W.Va. 823, 30 S.E. (2d) 342 (1944); Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W. (2d) 736 (1947).

[7] Stephenson v. City of Raleigh, note 4 supra; Boice v. Bd. of Education of Rock District, note 4 supra; Pohland v. City of Sheboygan, note 6 supra.

[8] Rittmiller v. School District No. 84, note 6 supra; Utz v. Bd. of Education of Brooks County, note 6 supra; Hummer v. School City of Hartford City, note 6 supra.

[9] Rogers v. Butler, 170 Tenn. 125, 92 S.W. (2d) 414 (1936); Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W. (2d) 648 (1945); City of Kingsport v. Lane, 35 Tenn. App. 183, 243 S.W. (2d) 289 (1951).

[10] Taylor v. Knox County Bd. of Education, 292 Ky. 767, 167 S.W. (2d) 700 (1942).

held that the purchase of liability insurance by a municipal corporation waives its immunity to the extent of the insurance coverage, and it is this line of authority in Tennessee that the principal case follows.[11] The Tennessee theory is that immunity rests upon a trust fund concept, and that so far as judgments may be satisfied out of an insurance fund there is no reason for the immunity.[12] A second problem that arises when a municipal corporation purchases liability insurance to cover a function within the immunity sphere is whether the municipality has the power to make such a contract: is the municipality spending public funds for a private rather than a public purpose?[13] What little direct authority there is on this subject suggests that a municipal corporation may not have the power to purchase liability insurance where no obligation exists to pay a possible claim.[14] Regardless of any theoretical objections to the result reached in the principal case, however, it would seem that it offers, in lieu of legislation, an excellent means of relief from the immunity doctrine.

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[11] In the principal case the legislature had not authorized the purchase of the insurance, the situation to this extent being like that in City of Kingsport v. Lane, note 9 supra, and unlike that in Rogers v. Butler, note 9 supra, the only other case in accord with the principal case decided by the Tennesse Supreme Court.

[12] Rogers v. Butler, note 9 supra.

[13] 15 McQUILLIN MUNICIPAL CORPORATIONS, 3d ed., §§39.19 to 39.31 (1950).

[14] Pohland v. City of Sheboygan, note 6 supra; Bd. of Education v. Commercial Casualty Ins. Co., 116 W.Va. 503, 182 S.E. 87 (1935) (board of education permitted to recover premiums paid for liability insurance since acquisition of insurance did not remove its immunity to suit). See also ATTY. GEN. OF MINN. REP., Op. No. 60 (1940). OP. ATTY. GEN. OF PA. No. 324 (1940); Rosenfield, "Governmental Immunity from Liability for Torts in School Accidents," 5 LEGAL NOTES ON LOCAL GOV. 358 at 369 (1940). A contrary conclusion is implied, of course, where the taking out of a liability insurance policy by a municipal corporation is held to waive its immunity pro tanto. See City of Kingsport v. Lane, note 9 supra, and the principal case.