MUNICIPAL CORPORATIONS-TORT LIABILITY OF MUNICIPALITY FOR INJURY CAUSED BY NEGLECT TO PERFORM MANDATORY DUTY

J. S. Ransmeier S.Ed.
University of Michigan Law School

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Municipal Corporations—Tort Liability of Municipality for Injury Caused by Neglect to Perform Mandatory Duty—By statute the State of New Jersey imposed upon every New Jersey municipality the obligation to insure the drivers of municipal motor vehicles against liability for damages resulting from the operation of such vehicles. The Township of Lyndhurst neglected to procure insurance in favor of plaintiff, and a personal judgment was recovered against him for his negligent operation of a township fire truck while in pursuance of his municipal duties. Plaintiff brought the present action to recover from the municipality for its breach of the statutory obligation. Judgment below was for defendant. On appeal, held, affirmed, three justices dissenting. The mandatory power to insure its drivers imposed a governmental duty upon the municipality. Absent express provision for a private right of action for breach of such a duty, the remedy must be by way of indictment rather than by private civil action. *Osback v. Lyndhurst Township*, (N.J. 1951) 81 A. (2d) 721.

It is a well-recognized rule of tort law that where a party fails to conform to a statutory standard of conduct and injury results to one whom the statute is intended to protect, a civil action will lie in behalf of the one injured.1 Where the wrongdoer is a municipal corporation, however, this rule must be qualified in the light of general principles of municipal tort liability.2 Thus, where the

1 *Prosser, Torts* §39 (1941).
2 See generally, 6 *McQuillen, Municipal Corporations*, c. 53 (1937); 38 Am. Jur. 260 et seq.
municipal breach of conduct relates to a governmental activity, it has traditionally been held that no liability arises in the municipality unless express statutory provision is made therefor. On the other hand, where the municipal fault pertains to a proprietary, corporate, or ministerial activity, no immunity is recognized and civil liability may be enforced. Unfortunately, the proper characterization of particular municipal functions as governmental or otherwise presents a vexing problem. While diverse classificatory criteria have been suggested, the courts have arrived at no consensus in the matter. Indeed, different courts have so frequently reached different conclusions as to the label to be attached to the same function that one may suspect that at least upon occasion the characterization has rather followed than determined the court's decision on the question of liability. The unsatisfactory state of the law in this area is well illustrated by the principal case. Here the result was contingent upon the court's characterization of a mandatory power to provide liability insurance for a member of the municipal fire department. On the theory that the municipality, in exercising a mandatory power, is simply an arm of the state and partakes of its immunity, the court found the imposed duty to be governmental in nature. While under New Jersey law civil liability might yet have attached if the breach had been by active wrongdoing rather than by mere nonfeasance, or if express statutory


7 McQuillen laconically observes, "These rules concerning municipal liability... are elementary. The only difficulty is in their application..." Municipal Corporations 1056 (1937).

8 For discussion of such criteria, see Borchard, "Government Liability in Tort," 34 Yale L.J. 129 at 132-133 (1924); Smith, "Municipal Tort Liability," 48 Mich. L. Rev. 41 at 44 et seq. (1949); 1 Brooklyn L. Rev. 85 (1932); and see Barker v. City of Santa Fe, 47 N.M. 85, 136 P. (2d) 480 (1943).

9 Lloyd v. Mayor, etc. of New York, 5 N.Y. 369 at 375 (1851); Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911); Rhoubos v. Chicago, 332 Ill. 70, 163 N.E. 361 (1928).

10 Compare the following cases discussing the municipal duty properly to maintain the public streets: Majka v. Haskell, 301 N.Y. 206, 93 N.E. (2d) 641 (1950); Gillies v. City of Minneapolis, (D.C. Minn. 1946) 66 F. Supp. 467; Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E. (2d) 357 (1945); Aerotec v. Town of Greenwich, (Conn. 1951) 82 A. (2d) 356; as to the operation of fire-fighting equipment, compare Powell v. Village of Benton, 240 Mich. 94, 214 N.W. 968 (1927); Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), overruled by Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922); and Maxwell v. Miami, 87 Fla. 107, 100 S. 147 (1924).


provision had been made for liability in the event of default, neither of these conditions was met. Accordingly, the general rule of immunity for default in the discharge of a governmental duty was held to be applicable. On the other hand, the Court could have found ample authority to support a contrary result, holding that a mandatory power is not inherently governmental, that in the principal case the obligation to provide insurance involved merely a ministerial duty, and that no express statutory authorization was required for a civil action brought for private injury resulting from the breach of a mandatory ministerial duty.

Since the tendency of the courts has been steadily to narrow the scope of municipal immunity and since the policy basis for a decision upholding immunity in the instant case seems questionable, it would not have been surprising if the decision had adopted the latter view. But the court apparently regarded prior case authority as too closely in point to be disregarded. The decision is illus-

\[\text{TRUHLAR v. BOROUGH OF E. PATERN, 4 N.J. 490, 73 A. (2d) 163 (1950).}\]

\[\text{NOTE 3 supra.}\]

\[\text{6 McQUILLEN, MUNICIPAL CORPORATIONS 1063 (1937); 38 AM. JUR. 273; and see Day v. City of Berlin, (1st Cir. 1946) 157 F. (2d) 323.}\]

\[\text{"Official action . . . is ministerial when it is absolute, certain and imperative involving merely the execution of a set task, and . . . nothing remains for discretion." 38 AM. JUR. 273. Though it is conceded plaintiff's employment was in pursuance of a governmental function and though the duty to insure him is regarded as collateral to that employment, this need not be conclusive as to the governmental nature of the collateral duty. 6 McQUILLEN, MUNICIPAL CORPORATIONS 1034 (1937). See also Scibilia v. City of Philadelphia, 279 Pa. 549 at 554-555, 124 A. 273 (1924).}\]

\[\text{See Consolidated Apartment House Co. v. Baltimore, 131 Md. 523 at 532, 102 A. 920 (1917).}\]

\[\text{SMITH, "MUNICIPAL TORT LIABILITY," 48 MICH. L. REV. 41 at 45 (1949); 46 HARV. L. REV. 305 (1932).}\]

\[\text{The majority result is not calculated to make public service attractive. By rigid application of an ancient and somewhat dubious maxim, it would permit the financial ruin of a public employee who inadvertently commits a tort in the good faith discharge of his duties, reasonably believing himself covered by municipally-procured insurance and though he might otherwise have taken out insurance at his own expense. Note that if the municipality had contributed funds to defend the original action against plaintiff or had reimbursed him for the amount of the judgment, this would have been an expenditure for a proper public purpose. Cullen v. Town of Carthage, 103 Ind. 196, 2 N.E. 571 (1885); 2 McQUILLEN, MUNICIPAL CORPORATIONS §532 (1937). Perhaps plaintiff's position was prejudiced by the fact that he was himself a tortfeasor. But his tort was distinct from the alleged tort of the municipality.}\]

\[\text{It should be noticed that an alternative line of analysis might have found liability in the municipality, entirely short-cutting the problem of classification of municipal powers. The statute, being mandatory, might have been construed as expressing the intention of the legislature that the municipality be financially responsible for its torts as to those for whose benefit the statute was passed. The question would then be whether the statute was passed for the benefit of (1) the employee, (2) the injured party, or (3) both. If either (1) or (3), recovery would have followed in this case. Cf. Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W. (2d) 736 (1947).}\]

\[\text{PRAY v. MAYOR, etc. of Jersey City, 32 N.J.L. 394 (1868); Board of Chosen Freeholders of Sussex v. Strader, 18 N.J.L. 108 (1840); Knauer v. City of Ventnor City, 13 N.J. Misc. 864, 181 A. 895 (1935).}\]
trative of the anomalous results which will continue in municipal tort cases until adequate state legislation is brought to bear upon the governmental immunity doctrine.\textsuperscript{22}

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J. S. Ransmeier, S. Ed.
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\textsuperscript{22} 46\textsc{Harv. L. Rev.} 305 (1932). As to the proper scope of municipal immunity, see Smith, "Municipal Tort Liability," 48\textsc{Mich. L. Rev.} 41 at 49-56 (1949).