Michigan Law Review

Volume 56 | Issue 3

1958

Municipal Corporations - Tort Liability - Liability for Torts Committed by Municipal Employees in Exercise of Governmental Functions

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MUNICIPAL CORPORATIONS—TORT LIABILITY—LIABILITY FOR TORTS COMMITTED BY MUNICIPAL EMPLOYEES IN EXERCISE OF GOVERNMENTAL FUNCTIONS—Plaintiff sued the Town of Cocoa Beach for damages for the alleged wrongful death of her husband.[1] Plaintiff's husband had died of smoke suffocation after being locked in a jail which was left unattended by the city jailor. The lower court dismissed plaintiff's complaint. On appeal, *held,* reversed. A person injured by the negligence of a municipal employee acting within the scope of his employment may recover against the municipal corporation. *Hargrove v. Town of Cocoa Beach,* (Fla. 1957) 96 S. (2d) 130.

The present case is the first, absent statute, to abolish the historical distinction between governmental and proprietary functions and to hold municipal corporations liable for the negligence of their employees regardless of the type of function being performed.[2] The traditional view[3] is that municipal corporations are immune in the exercise of governmental functions but responsible for torts committed by employees in the exercise of proprietary functions.[4] While different standards are frequently applied to characterize municipal functions, the general view is that those pertaining to fire protection, police services, education, and health are governmental and those pertaining to utilities and income-producing property are proprietary.[5] Three principal arguments have been used to sustain the modern doctrine of municipal immunity for torts occurring in the performance of governmental functions.[6] (1) When performing governmental functions, a municipality acts as a subdivision of the state and is entitled to share in the state's sovereign immunity. (2) When performing governmental functions, a municipal servant's master is the state, not the municipality. (3) Public policy requires that municipal funds not be diverted into the payment of private claims. Relying on this reasoning

shoremen's & W. Union, note 4 supra, suggests this test: Are the two enterprises the same? Substantially the same criterion is proposed by International Brotherhood v. NLRB, (2d Cir. 1950) 181 F. (2d) 34, affd. 341 U.S. 694 (1951): Can the secondary employer freely discontinue doing business with the primary employer? Such a test would really eliminate the "ally" doctrine and give literal interpretation to the "doing business" aspect of §8(b) (4) (A); no account would be taken of any injurious effects created by the association of the two employers, which were "doing business."

[1] Fla. Stat. (1955) §768.01.

[2] But see Fowler, Admx. v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), 9 A.L.R. 471 at 473, overruled by Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

[3] See generally Barker v. Sante Fe, 47 N.M. 85, 136 P. (2d) 480 (1943); 18 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §§53.23 to 53.39 (1950); 2 ANTIEAU, MUNICIPAL CORPORATION LAW §§11.00 to 11.05 (1955).

[4] The origin of this rule is traceable to Russel v. Men of Devon, 2 T. R. 667, 100 Eng. Rep. 359 (1788). See Barnett, "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations," 16 ORE. L. REV. 250 (1937).

[5] See RHYNE, MUNICIPAL LAW §30-2, pp. 734-735 (1957); 18 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §53.30 (1950).

[6] See note 3 supra.

other state courts,[7] as well as Florida,[8] had prior to this decision held municipalities to be immune for negligence resulting in injury to prisoners on the ground that the operation of a jail is a strictly governmental function. However, in obliterating the governmental-proprietary distinction underlying the municipal immunity doctrine the Florida court feels that the common law maxim which has supported the distinction, i.e., the king can do no wrong, is an anachronistic concept, and it specifically rejects the argument that it is better for an individual to suffer a grievous wrong than to impose liability on the people vicariously.[9] The trend of past decisions of the Florida Supreme Court greatly facilitated its conclusion.[10] The court states that the doctrine of respondeat superior is applicable.[11] It confines its present holding, however, to negligent acts; whether it will hold respondeat superior applicable with respect to intentional acts is uncertain.[12] In addition, it is doubtful that the court intends to reject the immunity doctrine with respect to the state itself. It avoids the problem by characterizing the modern municipality as a business corporation[13] operated primarily for the benefit of its residents, rather than as a governmental subdivision, exercising its powers primarily on behalf of the state itself. The court expressly rejects municipal liability for torts occurring in the exercise of legislative or judicial functions.[14] Policy considerations require freedom from any restraints in this regard.[15]

While there has been an increasing amount of judicial criticism of the doctrine of municipal immunity and a general refusal to extend the classification of governmental functions,[16] stare decisis has prevented other courts from taking the position of the Florida court. By legislation, however, there has been general waiver of immunity in Great

7 See 46 A.L.R. 94 (1927); 50 A.L.R. 268 (1927); 61 A.L.R. 569 (1929).

8 Williams v. Green Cove Springs, (Fla. 1953) 65 S. (2d) 56.

9 Principal case at 132.

10 See Price and Smith, "Municipal Tort Liability: A Continuing Enigma," 6 UNIV. FLA. L. REV. 330 (1953). Principal case at 133.

11 For agreement with this see Flait v. Mayor and Council of Wilmington, 48 Del. (9 Terry) 89, 97 A. (2d) 545 (1953).

12 The modern law of agency generally holds the master liable when the use of force is a natural incident to the servant's job or if the wrongful means are used to promote the master's business. MECHEM, AGENCY, 4th ed., §§394 to 401 (1952). Rejection of liability would ultimately be based on the ultra vires nature of an implied command to commit a wrongful act. But this legal fiction has long been discredited. Respondeat superior is merely a means of allocating risk. If policy suggests that the municipality should be held liable, the legality of the servant's act should be irrelevant. For a general discussion see Miami v. Bethel, (Fla. 1953) 65 S. (2d) 34.

13 See Kaufman v. Tallahassee, 84 Fla. 634, 94 S. 697 (1922).

14 Principal case at 133.

15 See Smith, "Municipal Tort Liability," 48 MICH. L. REV. 41 at 49 (1949); 2 ANTIEAU, MUNICIPAL CORPORATION LAW §11.09, p. 96 (1955).

16 See, e.g., Madison v. City and County of San Francisco, 106 Cal. App. (2d) 232, 234 P. (2d) 995 (1951); Britton v. Eau Claire, 260 Wis. 382, 51 N.W. (2d) 30 (1952); Flait v. Mayor and Council of Wilmington, note 11 supra.

Britain,[17] the federal government,[18] and New York,[19] coupled with partial waiver by almost every other state.[20] This gradual erosion of the historical doctrine of municipal tort immunity presents the practical problem of crippling municipal treasuries through payment of numerous claims. Several courts have recently reaffirmed the immunity doctrine solely on the basis of this rationale,[21] recognizing the acuteness of the problem for municipalities having a small net worth.[22] To alleviate this problem it is suggested that execution could be withheld with respect to essential municipal funds. A more complete solution, perhaps, lies in the increased use of liability insurance to assure both individual recompense for torts committed by municipal employees and continued municipal solvency.[23]

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17 10 & 11 Geo. 6, c. 44 (1947).

18 28 U.S.C. (1952) §2674.

19 Court of Claims Act, N.Y. Laws (1939) c. 860, §8.

20 See Leflar and Kantrowitz, "Tort Liability of the States," 29 N.Y. UNIV. L. REV. 1363 (1954).

21 E.g., Thomas v. Broadlands Community Consol. School District No. 201, 348 Ill. App. 567, 109 N.E. (2d) 636 (1953); McCloud v. City of LaFollette, 38 Tenn. App. 553, 276 S.W. (2d) 763 (1954).

22 Cf. Warp, "Tort Liability Problems of Small Municipalities," 9 LAW AND CONTEM. PROB. 363 (1942).

23 Many states already require insurance to be carried. But since an insurance contract is one of indemnification, most states, absent statute, have denied recovery. However, recovery can still be justified on two grounds: (1) to the extent of coverage the municipality has waived its immunity. (2) The contract is for the protection of the municipal employee, and constitutes a "fringe benefit" of his employment contract. See generally 54 MICH. L. REV. 404 (1956).