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Municipal Tort Liability--Property and Governmental Functions

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menced by filing a complaint with the court,"[18] and "upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal. . . ."[19] Although there has been a question of interpretation,[20] the prevailing view is that filing the complaint conditionally suspends the statute of limitations, provided that the summons is issued "forthwith" and served within a reasonable time thereafter.[21]

The rule announced in the *Robinson* case is more reasonable in view of the added burden placed on court officers in processing today's greater volume of litigation. "The clerk is not controlled by the statute of limitations in the performance of his duties nor is he empowered by statute to exercise any control over its operation and effect."[22] Furthermore, it seems unreasonable to require an attorney to spend valuable time in the courthouse making certain that the summons is placed in the hands of the sheriff on the day the petition is filed. The instant decision is, therefore, a step forward in Ohio judicial procedure which will serve to eliminate some of the injustices which occurred under the prior rule.

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MUNICIPAL TORT LIABILITY — PROPRIETARY AND GOVERNMENTAL FUNCTIONS

Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).

Plaintiff Hack alleged injuries suffered through the negligent operation of a municipal swimming pool in Salem, Ohio. The defendant city demurred to the petition on the grounds that it did not state a cause of action. The issue in *Hack v. City of Salem* was whether the operation of a municipal swimming pool was a proprietary function or a governmental function immune from tort liability.[1] The common pleas court sustained the demurrer and the Court of Appeals for Columbiana County affirmed the decision. After granting a motion to certify, the Ohio Supreme Court

18. FED. R. CIV. P. 3.

19. FED. R. CIV. P. 4(a).

20. See *"Open Forum" Discussion of Proposed Rules of Civil Procedure,* 23 A.B.A.J. 965 (1937). Whether, under these rules, filing the complaint or issuance of summons constituted "commencement" of the action is a problem which presented itself to the Advisory Committee, but was unanswered. It appears, however, that the provisions of rule 4(a) which require the clerk to issue the summons "forthwith" and deliver it to the marshal for service will reduce the chances of such a question arising.

21. Newberg v. American Dryer Corp., 195 F. Supp. 345 (E.D. Pa. 1961) (filing complaint stopped statute even though summons not served until several months later); Robinson v. Waterman S.S. Co., 7 F.R.D. 51 (D.N.J. 1947); International Pulp Equip. Co. v. St. Regis Kraft Co., 55 F. Supp. 860 (D. Del. 1944)

22. Robinson v. Commercial Motor Freight, Inc., 174 Ohio St. 498, 503, 190 N.E.2d 441, 444 (1963).

reversed the lower court decisions, holding that the function was proprietary, and remanded the case for a determination of liability and damages.[2]

The supreme court held that both lower court decisions were based on *obiter dictum* in *Selden v. City of Cuyahoga Falls.*[3] Hence, the court was warranted in determining whether the operation of a municipal swimming pool was a governmental or a proprietary function. The court applied the test of *City of Wooster v. Arbenz*[4] and held the function proprietary[5] since the state legislature imposed no duty on municipal corporations to operate swimming pools and such a pool was operated for the comfort and convenience of its citizens.[6]

In terms of finding the operation of a municipal swimming pool a proprietary function, the *Hack* case is of no great moment. The significance of *Hack* lies in the fact that it represents an initial effort by the supreme court to set forth the rationale of Ohio's position concerning municipal tort liability. Further, the court indicated no enchantment with the position of municipal immunity in Ohio. In fact, three judges, in a vigorous concurring opinion, expressed their dissatisfaction with the concept of municipal immunity in negligence suits.

Subsequent to the instant case, the Ohio Supreme Court, in *Ball v. City of Reynoldsburg*,[7] ruled that the maintenance of a sewer system in Reynoldsburg, Ohio was proprietary. It must be noted, however, that of the three judges who participated in the concurring opinion in the *Hack* case, two joined the majority in *Ball,* thus apparently deserting their position taken in *Hack.* But this does not destroy Hack's significance for two reasons. The first and most obvious reason is that maintenance of a sewer system in *Ball* was clearly a proprietary function, while operation of a swimming pool in *Hack* could have been declared governmental. Since *Ball* involved a clear proprietary function, there was no necessity to maintain the position advocated in *Hack.* Second, the significance of *Hack* does not lie primarily in the concurring opinion but rather in the fact that

1. PROSSER, TORTS 775-77 (2d ed. 1955). Functions and activities which can be performed adequately only by government are said to be governmental in character and immune from tort liability. However, when the city performs a service which could be performed adequately by a private corporation, and particularly when the municipality collects revenue from it, the function is considered proprietary. A negligently performed proprietary function will render the municipality subject to liability.

2. Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963). The decision was unanimous for remand, but four to three in favor of maintaining the distinction between governmental and proprietary functions as they relate to liability in a negligence action against a municipal corporation.

3. 132 Ohio St. 223, 6 N.E.2d 976 (1937).

4. 116 Ohio St. 281, 284, 156 N.E. 210, 211 (1927).

5. Hack v. City of Salem, 174 Ohio St. 383, 388-90, 189 N.E.2d 857, 860-61 (1963).

6. If the court determined that the operation of the pool would be *directly* beneficial to public health as opposed to mere comfort and convenience, the operation of such a pool would be a governmental function.

7. 175 Ohio St. 128, 192 N.E.2d 51 (1963).

the Ohio court has finally enunciated the rationale for maintaining the status quo. More important, although stating Ohio's position, the court seemed to deliberately refrain from approving the status quo, and as will be seen below, only begged the question with its protests about being unable to disturb precedent and statements about leaving the task of change to the Ohio General Assembly.

The majority in *Hack* seems hidebound by three "principles of law" which it advances as controlling.

1. The doctrine of stare decisis requires the court to provide immunity for municipalities in their governmental functions.[8]

2. Sovereign immunity requires non-liability for the governmental functions of municipalities.[9]

3. It is the function of the legislature to change Ohio law on this subject.[10]

After an extensive analysis of the history of the problem,[11] the concurring opinion attacks all three "controlling principles of law" advanced by the majority. The concurring opinion, written by Judge Gibson, notes that the Ohio Supreme Court has rejected the dictates of stare decisis when it became necessary to change a basic position.

> This court was not afraid to reject the doctrine of stare decisis in *Avellone v. St. John's Hospital*[12] . . . when, upon looking at the facts as they exist in the 20th Century, it held that notwithstanding stare decisis a corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of *respondeat superior,* liable for the torts of its servants.[13]

The notion that sovereign immunity[14] serves as a basis for non-lia-

8. Hack v. City of Salem, 174 Ohio St. 383, 387, 189 N.E.2d 857, 860 (1963).

9. *Id.* at 387, 189 N.E.2d at 860-61. It would seem that sovereign immunity does not provide a logical basis upon which to base Ohio's position. For is it not a *non-sequitur* to argue that some suits (based on negligence in performing proprietary functions and nuisance) may be maintained against a sovereign while others (based on negligence in performing governmental functions) may not be maintained because the sovereign is immune from suit?

10. *Id.* at 384, 189 N.E.2d at 858.

11. *Id.* at 391-95, 189 N.E.2d at 862-67.

12. 165 Ohio St. 467, 135 N.E.2d 410 (1956).

13. Hack v. City of Salem, 174 Ohio St. 383, 396, 189 N.E.2d 857, 868 (1963). Courts which abolished non-liability for negligently performed governmental functions are not persuaded by the argument that the doctrine of stare decisis is controlling. See Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 218, 359 P.2d 457, 461 (1961); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

14. It is interesting to note that the notion of sovereign immunity is even imputed to a municipal corporation. Perhaps imprecise thinking has fostered this notion. A municipal corporation cannot command immunity allegedly reserved only to the sovereign. This is the prerogative of the state. However, in the exercise of governmental functions, the municipal corporation loses its identity and is viewed as an arm of the state. In this fashion it may invoke the immunity of the state. In the exercise of proprietary functions, the municipal corporation loses its public capacity and is rendered liable. See generally PROSSER, TORTS § 109 (2d ed. 1955).

bility has been so severely criticized[15] that it is somewhat surprising that the majority even advances this proposition to support its argument.[16] In contrast, Judge Gibson declares that the concept of sovereign immunity "is clearly wrong."[17] In support of this view, the concurring opinion points to the United States Supreme Court's decision in *Langford v. United States*:[18]

> We do not understand that either in reference to the Government of the United States, *or to the several States* . . . the English maxim [the King can do no wrong] has an existence in this country.

The final argument of the majority, that the legislature must be the instrument of change, is met in the concurring opinion by the fact that negligence as well as non-liability for governmental functions is judicially created.

> In no other area of the law has legislation played such a small part. The immunity provided to muncipalities for injuries arising out of governmental functions . . . is entirely the handiwork of the courts.[19]

The most succinct rebuttal to the argument of dependence on the legislature is found in *Pierce v. Yakima Valley Memorial Hosp. Ass'n.*[20] "We closed our court room doors without legislative help, and we can likewise open them."[21]

Since 1959, eight states have abolished the outmoded rule of municipal immunity.[22] Each court has encountered the three "principles of law" brandished by the majority in *Hack* and each principle has been found wanting. The reasoning of the courts in all eight states has paralleled the strong arguments offered by the concurring opinion in *Hack*. First, there is no valid reason for the "unjust consequences" of

15. PROSSER, TORTS 774-80 (2d ed. 1955); Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1 (1924); Green, *Freedom of Litigation: Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942). For a general treatment of the entire area see 9 LAW & CONTEMP. PROB. 179-370 (1942); Annot., 160 A.L.R. 7 (1946).

16. It would seem that considerations of public policy, although weak, would constitute a somewhat more tenable basis. However, the majority rules out this possibility. Hack v. City of Salem, 174 Ohio St. 383, 387, 189 N.E.2d 857, 860-61 (1963).

17. *Id.* at 395, 189 N.E.2d at 867.

18. 101 U.S. 341, 343 (1879). (Emphasis added.)

19. Hack v. City of Salem, 174 Ohio St. 383, 396-97, 189 N.E.2d 857, 868 (1963).

20. 43 Wash. 2d 162, 260 P.2d 765 (1953).

21. *Id.* at 167, 260 P.2d at 774. See also Green, *Freedom of Litigation: Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944).

22. Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).