Kentucky Law Journal

Volume 48 | Issue 4 Article 8

1960

Municipal Corporations--Constitutional Law--Liability of Employees

Burke B. Terrell
University of Kentucky

certain that the verdict will represent the value of all interests in the property. In borderline situations, such as the principal case, another proceeding among the condemnees may be necessary to determine the extent, if any, to which each is entitled to share in the proceeds.

John T. Bondurant

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — LIABILITY OF EMPLOYEES.— Defendant Erwin operated a fire truck as an employee of the City of Mayfield. In response to a call to help fight a fire in Murray, he was driving outside the corporate limits of Mayfield when his truck and the vehicle of the plaintiff were involved in an accident. This action was brought against Erwin[1] for his alleged negligence. The trial court dismissed the complaint, relying on Kentucky Revised Statutes[2] section 95.830(2), which provides in part: "Neither the city nor its officers or employees shall be liable in any manner on account of the use of the [fire] apparatus at any point outside of the corporate limits of the city. . . ." An appeal was taken. *Held*: Reversed, two judges dissenting. The statute freeing members of city fire departments from personal liability for their negligent acts is violative of two sections of the Kentucky Constitution: section 14, which provides, "all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay" and section 54, which provides, "the General Assembly shall have no power to limit the amount to be recovered for . . . injuries to person or to property." Both of these sections were intended to preserve those jural rights which had become well established prior to the adoption of the Constitution. *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1959)

The statutory provision invalidated in the *Happy* case was evidently part of the legislature's answer to *Jefferson County Fiscal Court v. Jefferson County*,[3] which declared that a city's contract to furnish fire protection to the surrounding county was ultra vires and void. KRS section 95.830, enacted the following year, furnished cities with the power which had been shown to be lacking in the *Jefferson County* case. It also contained the provision in question freeing fire-

[1] The City of Mayfield, the City of Murray, and the liability insurance carriers of the two cities were also defendants, but their positions are not relevant here.

[2] Hereinafter referred to as KRS.

[3] 278 Ky. 785, 129 S.W.2d 554, 122 A.L.R. 1151 (1939).

men from liability for negligent acts outside the city. Because this provision was not necessary to the fulfillment of the declared purpose of the act[4] and because no similar provision exists concerning the liability of firemen within a city, the writer doubts whether this provision received as much consideration by the legislature as it deserved.

It cannot be said, however, that the clause is without merit. That firemen not be burdened by the threat of liability while attempting to save the lives and homes of the populace could well be considered of vital importance to the community. Furthermore, the provision may have been included in an attempt to keep firemen's liability insurance rates, and indirectly their salaries, as low as possible.

On the other hand, the ancient idea that the public should be protected even at the expense of the individual, one of the arguments offered traditionally in defense of sovereign immunity,[5] will not support the present statute, which protects the individual fireman rather than the public generally. Besides, the "ancient idea" of municipal immunity is losing its popularity in the courts and in a few legislatures.[6] Cities are now usually in a better position to provide compensation for the injuries which they inflict than are the injured parties. The careless acts of a city and its employees should not be sanctioned, for this would promote greater carelessness. An innocent individual should not be made to suffer while the municipality or its firemen at fault remains unscathed.

The court suggests in the principal case that if the legislature were allowed to grant immunity to firemen, there would be no reason why it could not grant it to others, possibly even to private groups in which the public is declared to have an interest. Although this argument may be conjectural, it is logically sound. Neither of the constitutional provisions upon which the court relied contains any hint that a distinction should be made between suits against public employees and suits against anyone else.

Pro and con policy arguments may be persuasive, but the legislature made its policy known by the passage of the act, and its decision should stand unless in conflict with the Constitution. In concluding that the provision was unconstitutional, the court relied on two premises: (1) sections 14 and 54 prohibit the legislature from denying individuals those jural rights which were well established prior to the adoption of the Constitution, and (2) at common law individuals had a right to recover damages from employees of munici-

[4] See preamble to ch. 127 of the Ky. Acts of 1940 (H.B. 419).
[5] 23 Mich. L. Rev. 325, 337 (1925).
[6] Prosser, Torts 109, at 775 (2d ed. 1955).
[7] 330 S.W.2d at 414.

palities who were negligent in the performance of governmental functions. Abundant authority can be found in support of the second premise.[8] Therefore, the following discussion will relate solely to the interpretation of sections 14 and 54.

A provision similar to section 14 is found in the bills of rights of seventeen states.[9] The court of Tennessee has limited the scope of their section so that it is applied only to judicial and not legislative action.[10] Originally this was the view of Kentucky, but it has since been abandoned.[11] The problem of interpreting section 14 is minimized in Kentucky by a provision which complements the meaning of the clause by making it applicable to legislation.[12]

The real problem presented by section 14 relates to a determination of what is "due course of law." Though the section has been invoked as a guaranty of procedural rights,[13] we are presently concerned with substantive rights. As has already been indicated, the Kentucky court has held that the provision was intended to perpetuate jural rights which existed prior to the adoption of the Constitution. Apparently the court would construe "jural rights" to include the right to pursue those remedies which the law "took cognizance of and furnished a remedy for"[14] at the time when the Con-

[8] See, for example, Willet v. Hutchinson, 2 Root 85 (Conn. 1794) and Florio v. Jersey City, 101 N.J.L. (16 Gummere) 535, 129 Atl. 470, 40 A.L.R. 1253 (1925).

[9] Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Mississippi, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, West Virginia, and Utah. In Brown v. Wightman, 47 Utah 31, 151 Pac. 366 (1915), eleven other states were included in the list of those having similar provisions, evidently using "similar" rather broadly.

[10] Scott v. Nashville Bridge Co., 143 Tenn. (16 Thompson) 86, 223 S.W. 844 (1920). *Cf.* Adams v. Iten Biscuit Co., 63 Okla. 52, 162 Pac. 938 (1917).

[11] Johnson v. Higgins, 60 Ky. (3 Met.) 566 (1861), laid down the rule that § 14 limited the action of the courts, but did not restrict the legislature. Some fifty years later, in Williams v. Wedding, 165 Ky. 361, 176 S.W. 1176 (1915), §§ 2 and 14 were applied along with the fourteenth amendment to the federal constitution to invalidate a legislative act. However, no mention of Johnson v. Higgins was made in reaching this decision. Seventeen years later, in Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932), the rule of Johnson v. Higgins was at last recognized, but the court declined to follow it. It is interesting to note that Johnson v. Higgins had withstood the constitutional revision of 1891.

[12] § 26 of the Kentucky Constitution, which provides that "everything in this Bill of rights . . . shall forever remain inviolate; and all laws contrary thereto . . . shall be void" was interpreted as extending all limitations in the Bill of Rights to legislative acts in Ludwig v. Johnson, 243 Ky. 533, 542, 49 S.W.2d 347, 351 (1932), noted in 23 Ky. L. J. 659 (1935).

[13] Harbison v. George, 228 Ky. 168, 14 S.W.2d 405 (1929) (validity of fee requirement for bringing an action); Gratzer v. Gertisen, 181 Ky. 626, 205 S.W. 782 (1918) (statutory limitation of right to appeal); Louisville & Nashville R.R. Co. v. Greenbrier Distillery Co., 170 Ky. 775, 187 S.W. 296 (1916) (statutory restriction of evidence to that presented in administrative proceeding); and United Fuel & Gas Co. v. Commonwealth, 159 Ky. 34, 166 S.W. 783 (1914) (necessity of writ of prohibition).

[14] Eastman v. Clackamas County, 32 Fed. 24, 32 (C.C.D.Ore. 1887), cited with apparent approval in Ludwig v. Johnson, 243 Ky. 533, 541, 49 S.W.2d 347, 350-51 (1932).

stitution was adopted. Whether or not these rights are limited to tort actions is an open question, and inferences can be drawn from statements of the court which would support arguments either way.[15]

Other interpretatoins have been applied by the courts of Delaware[16] and Minnesota.[17] In Delaware the due course clause is said to "secure the citizen against unreasonable and arbitrary deprivation of rights" and to "[embrace] the principle of natural justice that . . . every man should have adequate legal remedy for injury done him by another."[18] The test of existence of the remedy at common law, though a relevant consideration, is not determinative, and cases will instead turn on the definitions of the somewhat undefined terms "rights" and "natural justice."

Minnesota also relates its due course clause to "general fundamental principles, founded in natural right and justice." However, the courts of that state interpret the clause as a mere declaration of inherent principles existing independently of the constitution and look to those principles in reaching decisions instead of allowing the provisions of the state bill of rights to form the bases of all rulings concerning the rights of the individual.[19]

The view taken by Kentucky has been criticized as being too inflexible. It allows injustice which was condoned by the common law to continue to be condoned. Yet, because the law at the time of the adoption of the Constitution is determinable, the Kentucky rule provides the courts and legislatures with a standard that can be applied with relative ease and certainty. On the other hand, Delaware and Minnesota allow each judge a free hand in determining whether the plaintiff has adequate remedy for injury done him by another. In order to overcome the objection of inflexibility, and at the same time maintain a maximum amount of certainty, a synthesis of the Kentucky and Delaware views is suggested: remedies which had become well established at the time of the adoption of the Constitution will be preserved unless such remedies are clearly and grievously inequitable or unsuitable.

The court in the present case also relied on section 54 to support the proposition that remedies which existed at common law may not

[15] Eastman v. Clackamas County, *supra* note 14, cited with apparent approval in Ludwig v. Johnson, *supra* note 12, contains an implication that § 14 would perpetuate the common law action on a debt. On the other hand, wording of the Kentucky court in Ludwig v. Johnson, 243 Ky. 533, 543, 49 S.W.2d 347, 351 (1932) indicates that the only action perpetuated is one concerning negligence.

[16] Gallegher v. Davis, 37 Del. 380, 183 Atl. 620 (1936).

[17] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936 (1889).

[18] Gallagher v. Davis, 37 Del. 380, 183 Atl. 620, 624 (1936).

[19] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936, 938 (1889).

be extinguished by the legislature. This section prohibits the General Assembly from limiting the amount to be recovered for injuries. It has been argued that while the legislature may not limit the amount of recovery in an action, it may nevertheless completely deny a right to bring suit.[20] The fallacy of this argument is obvious. A complete denial is certainly nothing less than an infinitive limitation. The latter is the position taken by the Kentucky court.[21]

But what remedies does Section 54 preserve? This question has rarely been answered outside Kentucky. In those states which have interpreted similar constitutional provisions it has been said that the legislature may not place limits upon the amount of damages for injuries recoverable at law[22] or at common law.[23] The former is rather vague, and may have been intended to be a short-hand statement of the latter. At any rate it is clear that the provision was intended to prohibit the legislature from limiting recovery for some type of injury. It is submitted that the standard based on remedies which existed at common law is reasonable and is consonant with the apparent intent of the authors of the various constitutions.

Problems which the Kentucky interpretation of section 14 left unanswered are similarly left unanswered as they relate to section 54. Thus, whether the rule will be applied inflexibly, and whether it will be applied to, for example, the right to sue on a contract remain matters of conjecture.

In conclusion, the writer feels that the result reached in the principle case was found,[24] and that the rules relied upon, so far as they went, are reasonable. It is believed that the statute in question was undesirable as a matter of policy, and that it was properly held unconstitutional. The only criticism which can be leveled against the decision is its failure, perhaps intentional, to fully set the bounds within which sections 14 and 54 will apply.

Burke B. Terrell

[20] Ludwig v. Johnson, *supra* note 12.

[21] *Ibid*: also see Kentucky State Journal Co. v. Workmen's Compensation Bd., 161 Ky. 562, 170 S.W. 437 (1914).

[22] See Jackman v. Rosenbaum Co., 263 Pa. 158, 106 Atl. 238 (1919).

[23] See Industrial Commission v. Frohmiller, 60 Ariz. 464, 140 P.2d 219 (1943).

[24] Reference must be made to McDermott v. Irwin, 148 Ohio 67, 73 N.E.2d 86 (1947), in which the court ruled that in a similar fact situation no debatable constitutional issue was presented. Although Ohio has a constitutional provision almost identical to § 14 of Kentucky, no mention was made of it in the opinion, and there is no way to know if it was even considered.