Tulsa Law Review

Volume 1 | Issue 1

1964

Municipal Corporations: Crumbling Wall of Tort Immunity

David Field James

cause of the legislation on books of account the legislature has also demonstrated a willingness to trust the veracity of hospital records made in the usual course of business?

The *Hembree* test does not take cognizance of the persuasive arguments by the scholars in the evidence field. The *Hembree* test in reality destroys a hospital records exception to the hearsay rule. Under this test, a keeper of the records could not qualify the records for admission into evidence because he could not testify from his own knowledge that the records were correctly kept, nor could he testify that they were made at or near the time of the transaction to which they relate. Since the *Hembree* test requires some personal knowledge of the entries, especially if their correctness is an issue, the only resort for a litigant is to look to the people who actually made the entries.

The leniency of litigants, and of the trial courts, in allowing hospital records into evidence upon the testimony of a keeper of the records, who has no personal knowledge of the entries contained in the records, has forestalled the possible effects of the *Hembree* and *Altus* cases. However, this leniency may not last forever. Someday the Supreme Court of Oklahoma may have to face an argument that there is no effective hospital records exception to the hearsay rule of evidence in Oklahoma.

Ronnie Main

MUNICIPAL CORPORATIONS: CRUMBLING WALL OF TORT IMMUNITY

"One of the mysteries of legal evolution"[1] began with the 1788 English case of *Russell v. Men of Devon*[2] where it was found that the inhabitants of Devon were duty bound to keep a certain bridge in repair and their failure to do so caused damage to Mr. Russell's wagon. In an action against the inhabitants of the county, the court denied relief. Judge Ashhurst recognized the principle that the law provides a remedy where there is an injury by neglect, but felt that another principle prevailed: ". . . that it is better than an individual should sustain an injury than that the public should suffer an inconvenience."[3] Other reasons were propounded which were equally as convincing then, but not as convincing today: there was a fear that by compensating Mr. Russell an infinite number of actions would arise; there was no precedent for this suit; there was no fund out of which the judgment could be satisfied and the decision to impose liability of this kind belongs to the legislature. The last argument is the only argument from *Russell* used by today's courts.

[1] Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1, 4 (1924).
[2] 2 T.R. 667, 100 Eng.Rep. 359 (K.B. 1788).
[3] *Id.* at 673, 100 Eng.Rep. at 362.

In 1812, the *Russell* case was used in the United States by Massachusetts in the case of *Mower v. Leicester.*[4] This was the first of a long line of United States decisions which was to create one of our most complex legal mysteries—municipal immunity from tort liability. Relying on *Russell,* the court held it to be a well settled common law rule that no action would lie against a quasi-corporation created by the legislature. *Russell* did not represent such a well settled common law rule. Later English cases[5] say the reason for denying relief in *Russell* was because the action was against the inhabitants of a county rather than a *corporate* body having funds out of which to satisfy a judgment. Supporting this view, Justice Pollock made this observation about *Russell*: "We think it clear, on the full consideration of that case, that the only reason why the action would not lie was, because the inhabitants of the county were not a corporation, and could not be sued . . . ."[6]

In spite of the English view of *Russell,* the courts of our country have become more engulfed in the folds of the developing mystery. After the *Mower* case, *Bailey v. Mayor of New York*[7] established the distinction between governmental and proprietary functions of municipal corporations, and the application of this distinction has put a burden on our courts that is both tiresome as well as embarrassing. Recently though, nine states have laid aside the burdens of municipal tort immunity. In each of these states tort immunity has been abrogated as it applied to municipal corporations and in some of the states, it has been extended to eliminate the defense for all levels of government from the state down through the municipality. Occasionally a court which has abrogated the doctrine of tort immunity has had second thoughts and has limited the effect of its decision by later judicial holdings. This is so even though the justices seem to agree that the doctrine is an anachronism and should be abolished. A major stumbling block remaining is stare decisis which the majority cannot ignore and the merits of which the minority can expound. A companion argument to stare decisis is that the doctrine is so well established by judicial opinion that legislation is the only way to make a change.

The first of the recent cases overruling the doctrine of municipal immunity is *Hargrove v. Town of Cocoa Beach.*[8] This 1957 Florida case held the city liable for the negligence of a police officer resulting in the death of Mr. Hargrove. The court concluded that there is no reason for granting immunity when an individual suffers a direct, personal injury proximately caused by negligence of a municipal employee who was acting within

[4] 9 Mass. 247 (1812).
[5] Borough of Bathurst v. MacPherson, 4 A.C. 256 (P.C. 1879) (New So.W.); M'Kinnon v. Penson, 8 Ex. 318, 155 Eng.Rep. 1369 (1853).
[6] M'Kinnon v. Penson, *supra* note 5, at 327, 155 Eng.Rep. at 1372 - 1373.
[7] 3 Hill 531 (Sup.Ct.N.Y. 1842).
[8] 96 So.2d 130 (Fla. 1957).

the scope of his employment. As early as 1850, the Florida courts had held a city liable for the negligence of its employees[9] and this court desired to reinstate municipal liability and thereby remove Florida courts from the governmental-proprietary quagmire. In disagreeing with the proposal that tort immunity should be abrogated by legislative action, the *Hargrove* court said, "We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."[10] As for stare decisis, the court very concisely said: "Judicial consistency loses its virtue when it is degraded by the vice of injustice."[11] Florida's decision was a refreshing change, but was limited, for later cases said this decision would only apply to municipal corporations, and not to the state, its counties or school boards.[12]

New Jersey abolished municipal immunity in *McAndrew v. Mularchuk*[13] by holding the Borough of Keansburg liable for the wrongful act of one of its part time policemen. Prior to this decision the court would not impute negligence to a municipality unless the act was committed by one of the hierarchy of the body. Now, a municipality is liable on general principles of respondeat superior, without regard to the employees position. *McAndrew* disposed of stare decisis and the legislative argument by approving the position taken in the *Hargrove* case.

The California Supreme Court decided *Muskopf v. Corning Hospital Dist.*[14] with a penetrating decision written by Justice Traynor. After condemning the foundation of governmental immunity, Traynor felt that a re-evaluation of the rule of governmental immunity from tort liability displayed that it was mistaken and unjust and should be discarded.[15] He supported this statement by pointing out that the doctrine had been eroded by both legislature and courts, and he therefore felt this decision was not a startling break with prior decisions. On the contrary, he believed it was a logical step to conclude an established trend.

The defense here, like the defense in *Hargrove,* urged that the legislature should make the break. It contended that prior limitation[16] of the doctrine by the legislature constituted an expression that there be no further change by the courts. Secondly, it urged that the doctrine was so firmly established that only the legislature should effect a change. Answering the first argument, the court interpreted legislative action in areas of governmental immunity to mean that immunity was especially evil in those areas

[9] Tallahassee v. Fortune, 3 Fla. 19 (1850).
[10] 96 So.2d at 132.
[11] *Id.* at 133.
[12] Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962); Buck v. McLean, 115 So.2d 764 (Fla.App. 1959).
[13] 33 N.J. 172, 162 A.2d 820 (1960).
[14] 155 Cal.2d 211, 359 P.2d 457 (1961).
[15] *Id.* at 211, 359 P.2d at 458.
[16] *E.g.*, WEST'S ANN. CAL. GOV. CODE, §§ 53050 - 53056 (1955).

and therefore, should be abolished, leaving the remaining areas for courts to make their own interpretations. Convincing logic was used to answer the second defense. Immunity was not as established as contended, reasoned the court, for the defense of governmental immunity had been previously limited both by the courts and by the legislature and therefore, this decision did not drastically change the concept of governmental immunity.

Molitor v. Kaneland Community Unit Dist.[17] is another of the modern decisions which limited tort immunity. The Illinois Supreme Court dealt with a school district in this case but inferentially applied the ruling of the case to municipal corporations. Later decisions show that inference was to be implemented.[18] *Molitor* echoed the *Muskopf* view when it arrived at the conclusion that school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society.[19] This decision was supported by several reasons; first, the doctrine as it stemmed from *Russell* rested on a faulty foundation. Second, the rule that "the King can do no wrong" is inapplicable to our basic legal concepts and especially inapplicable to local government units. Thirdly, the court felt that since the courts had made the rule, it was in their power to abolish it. Lastly, it escaped stare decisis by saying it was a judicial duty to mold the law to modern ideas of justice.

Next in the series of precedent making decisions is the 1961 Michigan case of *Williams v. City of Detroit*,[20] which was a five to three decision abolishing municipal tort immunity. There was some confusion, however, as to what extent the majority opinion went in overruling the doctrine of governmental immunity. Four of the Justices spoke broadly of governmental immunity, but Justice Black especially limited the decision to municipal immunity. Later holdings show that the decision was limited to municipal corporations only and did not apply to the state or its subdivisions.[21] Justice Black summed up the status of arguments concerning the retention of municipal immunity from tort liability by saying:

> "Little time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not 'Should we?'; it is 'How may the body be interred judicially with non discriminatory last rites?'. . . . The doctrine looks in vain

[17] 18 Ill.2d 11, 163 N.E.2d 89 (1959).

[18] List v. O'Connor, 19 Ill.2d 337, 167 N.E.2d 188, 190 (1960); Peters v. Bellinger, 19 Ill.2d 367, 166 N.E.2d 581, 582 (1960).

[19] 18 Ill.2d at 11, 163 N.E.2d at 96.

[20] 364 Mich. 231, 111 N.W.2d 1 (1961).

[21] Lewis v. County of Genesee, 370 Mich. 110, 121 N.W.2d 417 (1963); Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N.W.2d 69 (1962); McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961).

around our conference table for a defender of its once alleged merit."[22]

Like in *Muskopf*, the Justices wishing to retain the tort immunity doctrine, dwelled on the argument that such a change should be made by the legislature. In answer, Justice Black expressed the feeling that the doctrine had devolved into a game of basketball between judges and legislators with neither wanting to make a final decision. Since the legislature had made no decision, he proposed the judiciary should make a decision to force an issue, for "the only alternative is inertia and cozy complacence in our lofty quarters as 'the rule of law' burns slowly to utter public disrespect."[23] In defense, the City of Detroit contended that if tort liability was imposed on them, it would be a crushing blow to their treasury. The court saw little merit in this contention because liability insurance could be obtained and was an excellent method by which damage caused by municipal negligence could be spread over the public at large. The majority evidently felt the crushing blow could better be sustained by the city than the individual.

Holytz v. City of Milwaukee[24] completely abolished governmental immunity in Wisconsin. Previous Wisconsin courts had expressed dissatisfaction with the immunity doctrine and had referred the matter to the legislature,[25] but it had failed to act and the doctrine remained. Thus, this court felt that it must act. After discussing the faults of the doctrine and demonstrating how it had evolved into an anachronism, the court then abolished tort immunity as "to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivision of the state . . . ."[26] All political subdivisions of the state were made subject to tort liability solely on respondeat superior, but the state remained immune. The state had a second line of defense, for the Wisconsin constitution directs the state to provide in what manner and in what courts suits shall be brought against it.[27] Since the Wisconsin legislature has yet to pass legislation which would apply to tort actions, the state, although liable, is still immune from suit.

In December of 1962, the Minnesota Supreme Court in *Spanel v. Mounds View School Dist.*[28] eliminated tort immunity as a defense for school districts, municipal corporations and other subdivisions of government; but the court refused to tamper with

[22] 364 Mich. at 231, 111 N.W.2d at 10.
[23] *Id.* at 231, 111 N.W.2d at 12.
[24] 17 Wis.2d 26, 115 N.W.2d 618 (1962).
[25] Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952).
[26] 17 Wis.2d at 26, 115 N.W.2d at 625.
[27] WIS. STAT. ANN. Const. art 4, § 27 (West 1957).
[28] 118 N.W.2d 795 (Minn. 1962).

state tort immunity. The veil of immunity was removed by breaking with precedent and reasoning that courts had the power to alter the then existing rules of liability. Even though the court did make the change through the exercise of judicial power, it felt the legislature would have been the ideal place to effect a change.

"A municipal corporation in Alaska does not enjoy immunity from tort liability, whether the act or omission giving rise to the liability is connected with either a governmental or proprietary function."[29] With these words, Alaska's Supreme Court in *City of Fairbanks v. Schaible*[30] sounded the death knell for municipal immunity. This opinion by Justice Diamond explained that non-immunity had actually been the tort rule in Alaska in territorial days, but because of misinterpretation, the rule had not been applied in recent years. According to the court's interpretation of the early laws, they decided there was no tort immunity for counties, incorporated towns, school districts or any other public corporation.

A 1963 decision by the Arizona Supreme Court in *Stone v. Arizona Highway Comm'n*[31] seems to abolish immunity in that state. There Ernest Stone brought an action against the Arizona Highway Commission for wrongful death and personal injuries caused by the negligence of the commission. In holding the commission liable, the court made the government liable for the tortious acts of its employees. This decision seems to effectively abolish the defense of governmental immunity for all levels of government. Since there have been no decisions limiting or overruling the *Stone* case and the Arizona legislature has not spoken on the subject, one can assume that governmental bodies in Arizona no longer enjoy immunity from tort liability.

Looking at the cases discussed, one cannot deny that there is a trend to abolish governmental tort immunity as a defense for municipal corporations. For three years following the *Hargrove* case, only one state attempted to significantly alter the doctrine. Since 1960, seven states have spoken to eliminate immunity as a defense. These courts have concurred in the abolition of municipal immunity, but they demonstrate a hesitancy to apply the abolition to county and state government. Fear of treading in the legislative realm often seems to be a pivotal factor. Some courts feel restrained by state constitutions, by stare decisis or by the fact that the fallacy of *Russell* does not apply as well to the state. In other courts, dissenting justices have been vociferous in asserting the idea that the remedy should come from the legislature. These strong dissents plus the weight of stare decisis

[29] City of Fairbanks v. Schaible, 375 P.2d 201, 208 (Alaska 1962).

[30] *Id.* at 201.

[31] 93 Ariz. 384, 381 P.2d 107 (1963).

are often sufficient to prevent the extension of liability beyond the precise situation before the court.

While the courts were vacillating, legislatures of several of the states discussed above have played important roles in the development of non-immunity. Some states helped implement judicial action by passing complementary laws and in other states the decision of the court was suspended or limited by legislative action.

In 1959 legislative action in New Jersey made State and private non-profit charitable, educational and religious associations and corporations immune from tort liability.[32] In view of the court's liberal attitude as expressed in *McAndrew,* it is interesting to note that their legislature has not made other subdivisions of government immune.

In California, soon after the *Muskopf* holding, the legislature passed a law reinstating the doctrine of governmental immunity as it had existed prior to this decision.[33] This law was not a legislative manifestation of an intention to retain governmental immunity, for the law only suspended the effect of *Muskopf* for two years.[34] The legislature obviously acted in order to give governmental bodies time to prepare for increased liability and to give themselves time to formulate rules for the added liability. In July of 1963, an act imposed tort liability on the state, counties, cities, public authorities and any other political subdivision or public corporation in that state.[35] This act conformed with the *Muskopf* decision, thereby giving legislative sanction to the judicial act.

The Illinois legislature took another view. It responded to *Molitor* by declaring tort immunity for park districts,[36] counties,[37] forest preserve districts,[38] and the Chicago park district.[39] Apparently agreeing with the *Molitor* court in reasoning that school districts should not be immune, the act made school districts liable but limited their liability to $10,000.00.[40] In light of the public policy in this law—". . . that there should be a reasonable distribution among members of the public at large of the burden of individual loss from injuries incurred as a result of negligence in the conduct of school district affairs . . . ."[41]—one might question a monetary limit. Even though the legislature placed a limit on

[32] N.J. STAT. ANN. 2A:53A - 7 (West Supp. 1962).
[33] WEST'S ANN. CAL. CIV. CODE, § 22.3 (Supp. 1963).
[34] *Ibid;* see Corning Hosp. Dist. v. Superior Court, 57 Cal.2d 488, 370 P.2d 325 (1962); Donnachie v. East Bay Regional Park Dist., 217 Cal.App.2d 207, 31 Cal.Rptr. 611 (1963).
[35] WEST'S ANN. CAL. GOV. CODE, §§ 814 - 895.8 (Supp. 1963).
[36] ILL. ANN. STAT. ch. 105, § 12.1 - 1 (Smith-Hurd Supp. 1962).
[37] ILL. ANN. STAT. ch. 34, § 301.1 (Smith-Hurd Supp. 1962).
[38] ILL. ANN. STAT. ch. 57½, § 3a (Smith-Hurd Supp. 1962).
[39] ILL. ANN. STAT. ch. 105, § 333.2a (Smith-Hurd Supp. 1962).
[40] ILL. ANN. STAT. ch. 122, §§ 821 - 825 (Smith-Hurd Supp. 1962).
[41] ILL. ANN. STAT. ch. 122, § 821 (Smith-Hurd Supp. 1962).

liability to prevent excess diversion of school funds,[42] it is not consistent with a policy to distribute an individual's loss among the public because an individual must ultimately bear a loss not compensable by $10,000.00. This limit is especially inconsistent when it is remembered that insurance may be available. By purchasing insurance, premiums would be a regular and anticipated expense that would be evenly distributed among the taxed public. The policies could be designed to fully cover most losses and would thereby compensate without dealing an injurious blow to the government treasury or an injured individual's pocket.

The Minnesota legislature accepted the invitation which was extended in the *Spanel* case. In 1963 it imposed tort liability on municipal corporations but exempted school and drainage districts to the extent that those entities were not covered by insurance.[43]

In Alaska, legislative action complemented judicial decision. Following *City of Fairbanks* which abrogated tort immunity below the state level, the Alaska legislature imposed tort liability on the state.[44]

In viewing these statutes, it is evident that the legislature did not express dissatisfaction with judicial decision. In some states, a limit was imposed on liability; in other states, there was a selection of public bodies which the legislature felt should be immune, but in no state is there a total reversal of the judicial decision.

Viewing legislative and judicial action as a whole, it may be concluded that there is a significant trend to abolish municipal tort immunity, but confusion still exists in two chief areas. First, who should take the step toward abolition? Jurists who feel the change should be legislative, contend the task is much too complex for courts to handle. Those jurists who ask for judicial change, reason that courts created the doctrine and can change it. They recognize that legislatures have the right to change the rule of liability, but feel legislative inaction does not preclude courts from making a change. One fact does remain. No legislature has reversed a judicial decision eliminating municipal tort immunity. The second area of confusion lies in deciding to what levels of government the abrogation of immunity should be applied. Some states have lifted the cloak of tort immunity from all levels of government and others have only lifted immunity from municipalities. There seems to be little or no consistency among the states in abrogating the doctrine on levels of government higher than municipalities, but one fact is evident—municipal immunity from tort liability has been eliminated in many states. Evidently this "mystery of legal evolution" is no longer a universal mystery.

David Field James

[42] *Ibid.*
[43] Minn. Sess. Laws 1963, ch. 798, §§ 466.01 - 466.17.
[44] ALASKA STAT. ANN., §§ 09.50.250 - 300 (1962).