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## Torts - Governmental Immunity - Special Procedural Requirements Unconstitutional

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the individual has a remedy without subjecting the official to the inhibitory fear of personal responsibility. Certainly it is only right that the government bear the ultimate burden of injuries which result from the pursuit of a public interest. Restraint of irresponsible official conduct can then be achieved by administrative discipline. While the Federal Tort Claims Act has moved in this direction by including a broad waiver of sovereign immunity in tort,<sup>36</sup> it still expressly excepts certain "intentional" torts, including defamation.<sup>37</sup> The state legislatures, reluctant to waive sovereign immunity have done virtually nothing to improve the situation.<sup>38</sup> So long as government refuses to face up to its responsibility, the courts must continue to resolve the problem, and the result may not be very promising to the one innocently defamed.

*Michael Friedlander*

<sup>36</sup> 28 U.S.C. § 2674 (1958).

<sup>37</sup> 28 U.S.C. § 2680(h) (1958).

<sup>38</sup> See generally Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.L. Rev. 1363 (1954).

#### TORTS—GOVERNMENTAL IMMUNITY—SPECIAL PROCEDURAL REQUIREMENTS UNCONSTITUTIONAL

Plaintiff slipped and fell upon the floor of a school building. Within a few days her son contacted a member of the school board and advised him that a claim for injuries would be brought before the board of education. Shortly thereafter an investigating agent of the defendant school district contacted plaintiff and obtained the information required by the notice provisions of Illinois Revised Statutes chapter 122, section 823. Relying upon statements by this agent that he would again contact the plaintiff relative to the claim, the plaintiff failed to secure counsel or give timely notice. Subsequently, a complaint by the plaintiff alleging negligence on the part of the school district in the composition and care of the floor was dismissed upon motion by the defendant in accord with Illinois Revised Statutes chapter 122, section 824, which gives the school district a right to bar an action if the plaintiff fails to file written notice within six months of the time of injury. Plaintiff successfully appealed, challenging the constitutionality of the notice provisions, which were alleged to be in violation of article IV, section 22 of the Illinois State Constitution prohibiting special legislation. *Lorton v. Brown County Community Unit School Dist. No. 1*, 35 Ill. 2d 362, 220 N.E.2d 161 (1966).

The present case is one of several decisions handed down by the Illinois Supreme Court in their attempt to up-date the out-moded rules concerning

governmental tort liability. Although many writers had expressed a belief that modernization was needed in this area,<sup>1</sup> the General Assembly remained inactive. Reform came through judicial action with the initial rejection of governmental immunity in *Molitor v. Kaneland School Dist. No. 302*.<sup>2</sup> From the time of that decision, the court recognized that numerous statutes relating to municipal tort liability had brought about an inconsistent pattern of recovery against governmental agencies. By declaring one of these statutes unconstitutional, the decision in *Lorton* represents a further whittling away at the legislative inconsistencies which have brought about inequalities of recovery against municipal corporations and is a step toward achieving uniformity of remedy for claimants against governmental agencies. This has been effected through a somewhat tenuous application of the mandate against special legislation,<sup>3</sup> which traditionally has been held inapplicable to municipal corporations.<sup>4</sup> The *Lorton* decision, however, extends the rationale of a prior application of this mandate in a case involving a park district,<sup>5</sup> to encompass not only school districts, but any municipal corporation which capriciously bars a claimant's right to recover. This case note will therefore survey the reasoning of the decisions leading up to the present case and attempt to discover what its decision presages for the future.

Under the doctrine of sovereign immunity, a school district, as an agency of the government, was immune from liability for tortiously inflicted personal injury arising out of the operation of a school.<sup>6</sup> Traditionally this rule had rested on two principles, the first of which is to the effect that official agencies operate for the benefit of the public as a whole, and the achievement of public goals should not be hampered by an over-emphasized concern for individual claims. This has been couched in the phrase, "The King can do no wrong."<sup>7</sup> The second principle states that public funds should not risk possible

<sup>1</sup> See Borchard, *Governmental Liability In Tort*, 34 YALE L.J. 1 (1924); 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); Rosenfield, *Governmental Immunity From Liability For Tort In School Accidents*, 5 LEGAL NOTES ON LOCAL GOVERNMENT 358 (1940); Comment, *Tort Claims Against the State of Illinois and its Subdivisions*, 47 NW. U.L. REV. 914 (1953).

<sup>2</sup> 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

<sup>3</sup> ILL. CONST. art. IV, § 22 (1870): "The General Assembly shall not pass local or special laws . . . granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever."

<sup>4</sup> *Curry v. Decatur Park Dist.*, 27 Ill. 2d 434, 189 N.E.2d 338 (1963); *Cf. Coutrakon v. Lohr*, 9 Ill. 2d 539, 138 N.E.2d 471 (1956).

<sup>5</sup> *Harvey v. Clyde Park Dist.*, 32 Ill. 2d 60, 203 N.E.2d 573 (1965).

<sup>6</sup> *Kinnare v. City of Chicago*, 171 Ill. 332, 49 N.E. 536 (1898).

<sup>7</sup> See generally, 38 AM. JUR., *Municipal Corporations*, § 573 (1941); Ehrlich,

depletion in the satisfaction of individual judgments.<sup>8</sup> This second principle was eliminated in 1952 by *Thomas v. Broadlands Comm. Consol. School Dist. No. 201*,<sup>9</sup> which established that a cause of action would lie against a school district if it held liability insurance; however, the immunity doctrine continued on the aforementioned rationale of governmental infallibility.

In 1870 governmental immunity was adopted in Illinois,<sup>10</sup> and in 1898 the doctrine was extended to school districts.<sup>11</sup> This was eight years after the English courts, which originated the doctrine,<sup>12</sup> refused a similar application.<sup>13</sup> For over fifty years, Illinois adhered to governmental immunity without reconsideration or re-evaluation. Then in the *Molitor* case,<sup>14</sup> the Illinois Supreme Court made an extensive reappraisal. The court viewed governmental infallibility as an anachronism from medieval times,<sup>15</sup> and held, as fundamental to the whole modern law of torts, that liability follows negligence and that individuals and corporations should be responsible for the negligence of their agents and employees acting in the course of their employment.<sup>16</sup> With the rejection of governmental infallibility, the final principle underlying governmental immunity had been taken away, and the doctrine collapsed.

After the rejection of school district immunity, the Illinois courts and General Assembly were forced to recognize that the reasoning which prompted the rejection of the school districts' claim of immunity also applied to other municipal corporations. With this, began an examination of the degree to which the various state agencies accepted tort liability. It was found that where the state had been protected under constitutionally created<sup>17</sup> and judicially supported sovereign immunity, but had made provisions for redress of claims sounding in tort,<sup>18</sup> the municipal and quasi-municipal corporations had established the opposite position. These various agencies attempted to

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*Proceedings Against the Crown*, VI CAM AND EHRLICH OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (1921).

<sup>8</sup> *Thomas v. Broadlands Comm. Consol. School Dist. No. 201*, 348 Ill. App. 567, 109 N.E.2d 636 (1952).

<sup>9</sup> *Id.* at 575, 109 N.E.2d at 640.

<sup>10</sup> *Town of Waltham v. Kemper*, 55 Ill. 346 (1870).

<sup>11</sup> *Kinnare v. City of Chicago*, *supra* note 6.

<sup>12</sup> *Russel v. Men of Devon*, 2 Term Rep. 671, 100 Eng. Rep. 359 (1788).

<sup>13</sup> See *Molitor v. Kaneland School Dist. No. 302*, 18 Ill. 2d 11, 15-16, 163 N.E.2d 89, 91 (1959).

<sup>14</sup> *Molitor v. Kaneland School Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

<sup>15</sup> *Id.* at 21, 163 N.E.2d at 94; see also, 38 AM. JUR., *Municipal Corporations*, § 573; Borchard, *Government Liability In Tort*, 34 YALE L.J. 1, 6.

<sup>16</sup> *Molitor v. Kaneland School Dist. No. 302*, *supra* note 14, at 20, 163 N.E.2d at 93.

<sup>17</sup> ILL. CONST. art. IV, § 26 (1870).

<sup>18</sup> *Supra* note 5, at 64, 203 N.E.2d at 575.

deny liability by individually seeking legislative immunity. The result was a highly erratic pattern of recovery against these corporate agencies: forest preserves and park districts were not liable for negligence; municipalities although without provisions for general immunity were liable only in certain instances; private schools and school districts had a ten thousand dollar ceiling on liability; counties were not liable for negligence, but were required to make provisions for indemnifying sheriffs and losses due to non-willful torts; township and district highway commissioners were fully liable for neglect of duty; and, drainage districts were liable for negligent torts, but the district commissioners were absolved of personal liability.<sup>19</sup>

In addition, the courts have classified local units of government as "quasi-municipal" and "municipal" corporations. The activities of the latter class have been categorized as "governmental" and "proprietary," with full liability in tort imposed if the function is classified as "proprietary."<sup>20</sup> The incongruities that have resulted from attempts to fit particular conduct into one or the other of these categories have been the subject of frequent comment.

Thus, one injured by a park district truck was barred from recovery while one injured by a city or village truck was allowed remedy, and one injured by a school district truck was allowed to recover only within a prescribed limit.

In 1964, this uneven distribution of the right to recover against governmental agencies came under attack in *Harvey v. Clyde Park Dist.*,<sup>21</sup> which sought to declare legislation granting immunity to park districts an unconstitutional violation of both the prohibition against special legislation in section 22 of article IV of the Illinois State Constitution, and section 19 of article II of that Constitution, which provides that "every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation."

The basis of the decision was the court's construction of article IV, section 22. The proscription against special legislation in this section was created to prevent arbitrary discrimination through enactments of the General Assembly.<sup>22</sup> It is not discrimination that is to be avoided, but its capriciousness.<sup>23</sup> Accordingly, legislation affecting distinct classes is permitted if the classification is reasonable and uniform<sup>24</sup> or pertains to a substantial dif-

<sup>19</sup> *Supra* note 5, at 63, 203 N.E.2d at 574.

<sup>20</sup> *Molitor v. Kaneland School Dist. No. 302*, *supra* note 14, at 17, 163 N.E.2d at 92.

<sup>21</sup> *Harvey v. Clyde Park Dist.*, *supra* note 5, at 64-65, 203 N.E.2d 574.

<sup>22</sup> *Rudolph Express Co. v. Bibb*, 15 Ill. 2d 76, 153 N.E.2d 820 (1958).

<sup>23</sup> *Springfield Gas and Electric Co. v. City of Springfield*, 257 U.S. 66 (1921); *Cf. Moshier v. City of Springfield*, 370 Ill. 541, 19 N.E.2d 598 (1939).

<sup>24</sup> *Seeman v. Greer College*, 302 Ill. 538, 135 N.E. 80 (1922).

ference which bears a proper relation to the classification.<sup>25</sup> When an enactment places a burden on some, but not all the people, or when there is no logical or discernible reason apparent for variation,<sup>26</sup> then the statute amounts to unconstitutional special legislation.

In light of this prohibition against arbitrary discrimination, the plaintiff in the *Harvey* decision successfully argued that the statute which purported to bar recovery against a park district violated the prohibition against special legislation, since recovery would have been granted had the same injury occurred in a school or forest preserve district. Such a pattern indicated that the sole basis for the differentiation was a fortuitous circumstance—whether the third-party tortfeasor happened to be under statutory provision for immunity. This is the type of arbitrary discrimination which would properly invoke the proscription against special legislation.

There is, however, a further consideration which limits the application of article IV, section 22. The prohibition concerning special legislation traditionally has not been applied against legislation solely affecting municipal corporations.<sup>27</sup> The precedent for this has been adhered to since 1911 when the court stated that, with respect to corporations created for the purpose of administering the affairs of state agencies through limited, delegated powers, with public funds derived from taxation, and officers elected for comparatively short terms, it would be unreasonable to assume that its affairs could be conducted by the same rules which govern the business of a private corporation with its own funds under continuous management.<sup>28</sup> Therefore, it would be essential to public interest that rules should be established governing the transactions of such bodies different from those which apply to the affairs of individuals and corporations.

In view of the exception made for legislation affecting solely municipal corporations, the interdiction against special legislation would have been inapplicable had the right to have civil action dismissed and future action barred been viewed only as an immunity conferred upon the school district.<sup>29</sup> Instead, the court has held the requirements of the provisions for notice to be merely a limitation on liability.<sup>30</sup> The sections of the act containing this limitation of school districts' tort liability, which the *Lorton*

<sup>25</sup> *Moore v. County Board of School Trustees of Logan County*, 10 Ill. 2d 320, 139 N.E.2d 738 (1957); *Moshier v. City of Springfield*, *supra* note 23; *Sellers v. Brady*, 262 Ill. 578, 105 N.E. 1 (1914).

<sup>26</sup> *Punke v. Village of Elliott*, 364 Ill. 604, 5 N.E.2d 389 (1936).

<sup>27</sup> *Curry v. Decatur Park Dist.*, *supra* note 4.

<sup>28</sup> *Condon v. City of Chicago*, 249 Ill. 596, 94 N.E. 976 (1911).

<sup>29</sup> *Cf. Curry v. Decatur Park Dist.*, *supra* note 4.

<sup>30</sup> *Haymes v. Catholic Bishop of Chicago*, 33 Ill. 2d 425, 211 N.E.2d 690 (1965).

decision has declared unconstitutional, included the requirement that a claimant file written notice of the claim in the office of the school board clerk or secretary. The inclusion of the required conduct on the part of the claimant class enlarged the scope of those affected by the legislation to include more than solely the school district. Since the legislation affected more than solely the quasi-municipal corporation, the traditionally restricted application of the prohibition against special legislation was avoided. Then, by viewing the provisions for notice as a burden placed on the claimants against school districts which is not uniformly borne by those bringing actions against other state agencies, the limitation was declared unconstitutional.

Beyond extending the application of the special legislation sanctions to school districts, the *Lorton* decision, in line with the *Molitor* holding, sets further restrictions upon other governmental agencies attempting to deny liability for negligence. In its decision the court specified that any statute which applied a procedural right to some, but not others, under substantially like circumstances, should be held unconstitutional.<sup>31</sup> The like circumstances which the court was looking at was not the pattern of recovery solely among claimants against the school district, but the distinction between cases brought against school districts as opposed to those against other quasi-municipal corporations.<sup>32</sup> It cannot be denied that there was discrimination between litigants who satisfied the school district provisions and those who did not; however, reasons have been given why notice provisions such as these are necessary,<sup>33</sup> and previous decisions applying article IV, section 22 have pointed out that such discrimination is permissible when in line with the purpose of the legislation.<sup>34</sup> There was, however, no discernible reason for variation in recovery between a case barred for failure to file notice in an action against a school district and recovery against another district where such provisions are not required. If the perspective was a consideration of acceptance of liability in a school district as opposed to other governmental corporations, then this is indication that the provisions were objectionable because they in effect conferred upon the school district a means of denying liability when other districts would be held accountable.

Therefore, although it was necessary to phrase the challenge to constitutionality in terms of the burden imposed upon claimants in order to sufficiently widen the scope of those affected by the legislation to permit

<sup>31</sup> *Lorton v. Brown County Community Unit School Dist. No. 1*, 35 Ill. 2d 362, 366, 220 N.E.2d 161, 163 (1967).

<sup>32</sup> *Id.*

<sup>33</sup> David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1, 32 (1959).

<sup>34</sup> *Moshier v. City of Springfield*, *supra* note 23.

application of article IV, section 22, there is further indication consistent with the notion that the provisions appear objectionable because of the privilege they conferred to the school district and not because of their function per se. The court pointed out that the substantially identical provisions in the Local Governmental and Governmental Employees Tort Immunity Act<sup>35</sup> would not be repugnant to the constitutional proscriptions. The provisions of the suggested legislation are distinguished from the stricken statutes in that the former are uniformly applied to all the municipal and quasi-municipal corporations.

The *Lorton* decision will not be the last in line to rule upon the propriety of procedural considerations affecting liability of quasi-municipal corporations. Collectively, the recent decisions of the Illinois Supreme Court have established a trend toward placing upon governmental agencies, with certain modifications, the same responsibility individuals or business entities have with respect to tort liability. When future comment appears on the remaining statutes, which were enacted to meet the additional responsibilities placed on governmental agencies after the rejection of governmental immunity, it should be borne in mind that the reasons for the traditionally restricted application of the proscription against special legislation also serve to point out that governmental corporations, which cannot always be reasonably expected to operate by the same rules that govern private corporations, have a greater need for notice of claims. The School District Tort Liability Act recognized this. The *Lorton* decision, however, has rejected the school districts' notice provisions and created a void in procedural needs. To fill this void it appears likely that more emphasis will be placed on the future enforcement of the uniform provisions of the Local Governmental and Governmental Employees Tort Immunity Act not only in the school districts but in all municipal and quasi-municipal corporations.

*Thomas Puklin*

<sup>35</sup> ILL. REV. STAT. ch. 85, §§ 8-101 to -103 (1965).

UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS—  
JUDGMENT CREDITOR NOT A “BUYER”  
AT EXECUTION SALE

Shawmut National Bank was the assignee of a purchase money security interest in consumer goods perfected automatically under the Uniform Commercial Code (UCC).<sup>1</sup> Neither the secured party nor the assignee, Shawmut, had filed a financing statement. Charles Vera, an attaching judgment creditor

<sup>1</sup> The Uniform Commercial Code, section 9-302(1) provides that purchase money security interests in consumer goods are perfected automatically but filing is required for fixtures and motor vehicles required to be licensed.