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Local Government - Torts - Immunity of Municipality from Liability for Negligence

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labor practice under the LMRA, since no remedy in damages is granted under the federal statute.[11] In *Weber v. Anheuser-Busch*[12] the Supreme Court went a step further and held that a state may not prohibit the exercise of rights which may be reasonably deemed to come within the protection of the federal act. This decision came in logical sequence to the *Garner* case, for, although the *Garner* case arose where a state enjoined activity which was also prohibited by the federal act, there was language in the opinion to indicate that picketing not restrained by the act should be free from restraint.[13]

In light of the *Anheuser-Busch* case, the instant decision seems to be correct. The fact that the union was found not guilty on the merits of the specific unfair labor practice complained of was not enough to vest jurisdiction in the state court. The court declined to state whether or not the picketing was within the prohibition or protection of other sections of the federal act, recognizing primary jurisdiction in the NLRB to determine these questions. The court found, however, that the conduct "may be reasonably deemed to come within the protection afforded by the act."[14] This being so, the jurisdiction of the state court was preempted by that of the NLRB under the *Anheuser-Busch* test.

Both the *Garner* and *Anheuser-Busch* cases indicate that the Supreme Court intends to retain its policy of allowing a state court to enjoin picketing where there is violence involved.[15] State court injunctions in other cases should not issue where the activity is prohibited or may reasonably be deemed to be protected under the federal act.

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LOCAL GOVERNMENT — TORTS — IMMUNITY OF MUNICIPALITY FROM LIABILITY FOR NEGLIGENCE

Plaintiff sued defendant city for the wrongful death of her eight-year old son who drowned in a municipal swimming pool.

11. United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954).
12. 348 U.S. 468 (1955).
13. Garner v. Teamsters Union, 346 U.S. 485, 499 (1953).
14. Mississippi Valley Electric Co. v. General Truck Drivers, 229 La. 37, 85 So.2d 22, 27 (1955).
15. Weber v. Anheuser-Busch, 348 U.S. 468, 477 (1955); Garner v. Teamsters Union, 346 U.S. 485, 488 (1953).

The district court directed a verdict for the defendant. On appeal, the Minnesota Supreme Court *held*, affirmed. In the maintenance of a swimming pool a municipal corporation is engaged in a governmental function and is not susceptible to liability for negligence. The fact that a small admission charge is made to defray the maintenance expense does not make the function a proprietary one so as to subject the municipality to liability. *Nissen v. Redelack*, 74 N.W.2d 300 (Minn. 1955).

The doctrine that a municipal corporation is not liable for the negligence of its employees is an American interpretation of the old English maxim that "the king can do no wrong."[1] It is based on the notion that public funds should not be used to compensate the injury of an individual.[2] Recognizing the injustice which sometimes results from following the doctrine, the courts have sought to circumvent its application by adopting a legal fiction whereby negligent acts of municipal employees are classified into those resulting from "governmental" operations, for which there can be no liability, and those resulting from "corporate" or "proprietary" operations, for which there may be liability.[3] The tests to determine the classification of the operation vary,[4] but whenever the element of corporate profit is present, the function is usually classified as proprietary.[5] In spite of the difficulty encountered by the courts in

1. Borchard, *Government Responsibility in Tort*, 34 YALE L.J. 1, 129, 229 (1924), 36 YALE L.J. 757, 1039 (1927). Another maxim from which the doctrine has gained force is that "the state is above the law." This concept has given rise to the idea that governments must give their consent before they can be sued. However, it does not apply to municipal corporations, which have never been immune from suit. See 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.01 (3d ed. 1950).

2. 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).

3. Wysocki v. City of Derby, 140 Conn. 173, 98 A.2d 659 (1953); Woodford v. City of St. Petersburg, 84 So.2d 25 (Fla. 1955); Heitman v. Lake City, 225 Minn. 117, 39 N.W.2d 18 (1947); Millar v. Town of Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942); Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E.2d 357 (1945); Vaughn v. City of Alcoa, 194 Tenn. 449, 251 S.W.2d 304 (1952); Lakoduk v. Cruger, 287 P.2d 338 (Wash. 1955).

4. In Note, 1 BROOKLYN L. REV. 85, 88 (1932), the tests most often used are enumerated: "The municipality acts in a governmental capacity.

"I. When it performs a duty imposed by the legislature of the state.

"II. Only when such imposed duty is one the state may perform and which pertains to the administration of government.

"III. When the municipality acts for the public benefit generally, as distinguished from acting for its immediate benefit and its private good.

"IV. When the act performed is legislative or discretionary as distinguished from ministerial."

5. Libby v. City of Portland, 105 Me. 370, 74 Atl. 805 (1909); Foss v. City of Lansing, 237 Mich. 633, 212 N.W. 952 (1927).

applying the fiction[6] and the unanimous condemnation by text writers,[7] the dichotomy is well established in most of the states.[8] The instant case is a typical example of the law as it exists in the nation today. The Minnesota court recognized the injustice of the decision, but felt that it was too securely bound by precedent to make any change in the law. The fact was mentioned that a small admission charge was made for the use of the pool, but the court pointed out that it was merely incidental to the operation expense and that actually the municipality maintained the pool at a substantial loss. It was also noted that no charge was made to the deceased due to the fact that he was under a certain age limit. It is doubtful that by this observation the court meant to imply that a person who had not paid would be refused recovery, whereas one who had paid the admission fee could recover. This would mean that the operation of a swimming pool would be classified as governmental with

6. *Compare* Mocha v. City of Cedar Rapids, 204 Iowa 51, 214 N.W. 587 (1927) (operation of a swimming pool is a governmental function) *with* Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of a swimming pool is a corporate function); Keller v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505 (1919) (operation of a public park is a governmental function) *with* Warden v. City of Grafton, 99 W. Va. 249, 128 S.E. 374 (1925) (maintenance of a public park is a corporate function); Brock-Hall Dairy Co. v. New Haven, 122 Conn. 321, 189 Atl. 182 (1937) (liability denied for operation of a fire truck) *with* Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924) (liability recognized for negligence in the operation of a fire truck); Paine v. City of Rochester, 14 N.Y. Supp. 180 (Sup. Ct. 1891) (operation of a steam roller is a governmental function) *with* Denver v. Peterson, 5 Colo. App. 41, 36 Pac. 1111 (1894) (operation of a steam roller is a corporate function); Bateson v. Marshall County, 213 Iowa 718, 239 N.W. 803 (1931) (operation of a road grader is a governmental function) *with* Panhandle v. Byrd, 77 S.W.2d 904 (Tex. Civ. App. 1935) (operation of a road grader is a corporate function).

7. Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25), 36 YALE L.J. 1, 757, 1039 (1926-27); Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720 (1941); Green, *Freedom of Litigation III, Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949).

8. New York has refused to allow municipal immunity from tort liability where the state government, by statute, waived its immunity. Bernadine v. New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). See N.Y. Laws 1939, c. 860, § 8. South Carolina, realizing that too much confusion has resulted from the dual concept of governmental functions, has declared that the distinction no longer exists. Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911), but has ruled that municipalities would be immune from liability in all cases unless liability was expressly conferred by statute. At one time the Ohio Supreme Court abolished the rule and declared that municipalities would be judged on the same basis as private corporations, Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919), but the decision was overruled and the immunity doctrine reinstated three years later. Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922).

respect to one set of persons and proprietary to another group, thereby giving a dual characterization to the same operation.

The early Louisiana jurisprudence held cities liable for the negligence of their employees.[9] Subsequent adoption of the fiction that a municipality may operate in a dual capacity was hence not a limitation on the immunity doctrine but an introduction of it.[10] In applying the fiction in Louisiana, the courts have held a municipal corporation to be operating in its governmental capacity and not subject to liability in situations involving such acts as negligence of police officers[11] and firemen;[12] negligence in the maintenance of a public park and playground;[13] operation of a free garbage collection service;[14] operation of a swimming pool;[15] operation of an elevator in a municipal court building;[16] and the illegal enforcement of police regulations.[17] On the other hand the function has been declared to be proprietary and the municipality has been subject to liability when operating a public utility such as electric systems,[18] natural gas distribution systems,[19] and transportation systems.[20] Whenever the element of profit has been introduced

9. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850); McGary v. Lafayette, 12 Rob. 674 (La. 1846); Lambeth v. Mayor, 6 La. 731 (1834); Mayor v. Peyroux, 6 Mart.(N.S.) 155 (La. 1827).

10. Fordham & Pegues, *Local Government Responsibility in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 724 (1941). Stewart v. New Orleans, 9 La. Ann. 461 (1854) was the first case to mention the dual capacity of municipal functions in Louisiana. In the decision, two of the five justices dissented and a third concurred in the result. Therefore, the case cannot be regarded as very authoritative. Lewis v. New Orleans, 12 La. Ann. 190 (1857), however, affirmed the views of the *Stewart* case.

11. Joliff v. Shreveport, 144 La. 62, 80 So. 200 (1918); Lewis v. New Orleans, 12 La. Ann. 190 (1857).

12. Barber Laboratories v. New Orleans, 227 La. 104, 78 So.2d 525 (1955).

13. Loustalot v. New Orleans City Park Improvement Ass'n, 164 So. 183 (La. App. 1935); Godfrey v. Shreveport, 6 La. App. 356 (1927).

14. Manguno v. New Orleans, 155 So. 41 (La. App. 1934).

15. Rome v. London & Lancashire Indemnity Co., 169 So. 132 (La. App. 1936); *cf.* Rome v. London & Lancashire Indemnity Co., 156 So. 64 (La. App. 1934).

16. Hoqard v. New Orleans, 159 La. 443, 105 So. 443 (1925).

17. Roach v. Shreveport, 8 La. App. 339 (1928).

18. Oliphant v. Town of Lake Providence, 193 La. 675, 192 So. 95 (1939); Elias v. Mayor and Board of Trustees of City of New Iberia, 137 La. 691, 69 So. 141 (1915); Borrell v. Cumberland Telegraph and Telephone Co., 133 La. 630, 63 So. 247 (1913); Bonnin v. Town of Crowley, 112 La. 1025, 36 So. 842 (1904); Lawn v. City of Monroe, 8 La. App. 541 (1928); Hart v. Town of Lake Providence, 5 La. App. 294 (1927); Bannister v. City of Monroe, 4 La. App. 182 (1926).

19. Phillips v. City of Alexandria, 11 La. App. 228, 123 So. 510 (1929).

20. Solomon v. New Orleans, 156 La. 629, 101 So. 1 (1924); Davis v. New Orleans Public Belt R.R., 155 La. 504, 99 So. 419 (1924); Johnson v. City of Monroe, 164 So. 456 (La. App. 1935); Young v. New Orleans, 14 La. App. 306, 129 So. 247 (1930); Mask v. City of Monroe, 9 La. App. 431, 121 So. 250 (1928).

the function has usually been classified as proprietary.[21] Louisiana follows the rule that there may be liability for negligence in the maintanence of streets,[22] but has deviated from the doctrine in holding that in the construction of a street a city is engaged in a governmental activity and cannot be liable for negligence.[23] The immunity defense is personal to the city[24] and cannot be raised by the insurer in a direct suit against the insurance company.[25]

The injustice of the doctrine of immunity was not apparent when cities were small and the disbursement of municipal funds would have worked a hardship on the municipality. However, with the expansion of municipal activity the injustice has become evident and dissatisfaction has increased.[26] It has been argued that municipal officers would be unable to carry out their duties efficiently if subjected to rigid standards of care,[27] but there is no reason why the same standard applied to private individuals should not be applied to governmental employees. Supporters of the doctrine of immunity claim that the municipality would be too vulnerable a target and could not stand the burden of litigation; but, as one writer aptly said, to argue this point would be to "burn the ship to get rid of the rats."[28] A re-

21. Rome v. London & Lancashire Indemnity Co., 181 La. 630, 160 So. 121 (1935) (swimming pool to which a small admission charge was made was declared to be proprietary so as to subject the city to liability when it was not alleged that the charge was merely incidental to the operational expense); Brooks v. Bass, 184 So. 222 (La. App. 1938) (golf course operated for profit is a proprietary function).

22. Clinton v. City of West Monroe, 187 So. 561 (La. App. 1939); Holbrook v. City of Monroe, 157 So. 566 (La. App. 1954); Lemoine v. City of Alexandria, 151 La. 562, 92 So. 58 (1922); O'Neill v. New Orleans, 30 La. Ann. 220 (1878).

23. Prunty v. Shreveport, 61 So.2d 548 (La. App. 1952), *affirmed*, 223 La. 475, 66 So.2d 3 (1953).

24. Rome v. London & Lancashire Indemnity Co., 169 So. 132 (La. App. 1936).

25. LA. R.S. 22:665 (1950).

26. "The distinction between what is a governmental and what is a ministerial function of a city is not always so clear that a given transaction may at once be classified as the one or the other; but, whether governmental or not, it is always quite difficult, if not impossible, to give a satisfactory reason for holding a city immune from liability when through its own negligence or the carelessness or inefficiency of its agents and employees it violates a right of a citizen to his injury." Kaufman v. Tallahassee, 84 Fla. 634, 638, 94 So. 697, 699 (1922).

27. Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 MICH. L. REV. 325, 337 (1925): "In the final analysis the immunity rests upon three grounds; first, the technical rule that the sovereign is immune from suit; second, the ancient idea that it is better that an individual should suffer an injury than that the public should suffer an inconvenience; and third, that liability would tend to retard the agents of the city in the performance of their duties for fear of suit being brought against the municipality."

28. Green, *Freedom of Litigation III, Municipal Liability for Torts*, 38 ILL. L. REV. 355, 379 (1944).

cent attempt was made to have the Louisiana Supreme Court eliminate the immunity which it had created, but the court refused to alter its position.[29] Some municipalities have protected their citizens by taking out liability insurance, thereby waiving their immunity.[30] Such piecemeal action is effective within the sphere in which it operates, but complete elimination of the immunity doctrine can come only through legislative enactment.[31]

John B. Hussey, Jr.

LOCAL GOVERNMENT — ZONING — EXCLUDING COMMERCIAL ENTERPRISES FROM INDUSTRIAL AREAS

Plaintiff, intending to construct retail stores, purchased property located in an industrial zone of a municipality. After plaintiff had applied for a building permit, the zoning ordinance was amended to restrict the use of property in the industrial zone exclusively to "light industrial" uses which were not detrimental to health, safety, and property, and specifically to exclude residential and retail commercial uses. Plaintiff alleged that the amendment was unreasonable, arbitrary, and capricious, and a deprivation of property without due process of law. The trial court, sustaining the validity of the ordinance, issued a summary judgment for defendants. On appeal, the New Jersey

29. Barber Laboratories, Inc. v. New Orleans, 227 La. 104, 78 So.2d 525 (1955). The plaintiffs pointed out in their brief that the Louisiana Civil Code article 2315 was based on the French *Code Civil* article 1384 and cited the commentators: 14 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE PRATIQUE DE DROIT CIVIL 1147, § 2917 (2d ed. 1905); 8 HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL 598 (1895); 20 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 440, 667 (2d ed. 1876), as saying that immunity of municipalities from tort liability did not exist in France. See *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Local Government*, 16 LOUISIANA LAW REVIEW 308, 316 (1956).

30. Among the larger cities in Louisiana, New Orleans and Baton Rouge carry limited insurance, whereas Shreveport carries none (based on letters written by the author to city attorneys). Cities which own their public utilities generally carry liability insurance on them, for the operation of public utilities has been classified as proprietary and the governmental immunity has not extended to them. Of interest is section 6-303(2) of the Home Rule Charter of the City of New Orleans: "The City may, without waiver of its governmental immunity, procure public liability, bodily injury, and property damage insurance covering such risks and in such amounts as the Council may ordain, provided all such policies of insurance shall contain a stipulation that the insurer shall not assert the governmental immunity of the City as a defense of any suit on such policies."

31. The federal government has paved the way in this direction with the enactment of the Federal Tort Claims Act, 28 U.S.C. § 2671 (1952). For suggested state and local laws, see Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 LAW & CONTEMP. PROB. 282 (1942).