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Municipal Corporations - Torts - Liability for Negligence in Exercise of Governmental Function

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volves criminal aspects regarding lobbyists,[4] foreign controlled military and political organizations,[5] and all Communist "front" organizations.[6] The Federal Communcations Commission also requires that broadcasting stations announce the name of any person or organization that pays, either directly or indirectly, for a broadcast.[7] In this manner it is presumably possible for the public to obtain some degree of knowledge regarding the underwriters of these various groups or individuals.

A business utilizing the technique in honest competition—toward a legal end—without attempting to *directly* harm a competitor's business incurs no liability.[8] The end sought, or that which must necessarily result, must be actionable. If the end result is the creation of a monopoly, the use of the technique may be attacked as a violation of anti-trust statutes.[9] In other instances the use may create an actionable interference with prospective advantage,[10] or it may be unfair competition.[11] Another disadvantageous feature of the technique is the danger of running afoul of the Internal Revenue Department. A business which takes a deduction for advertising or other expense for the cost of a campaign of this nature runs the risk that such a deduction would not be allowed as being an expenditure of money for an illegal purpose.[12]

It is apparent that if the technique is to be used effectively, the public must remain ignorant of the true source of the information and propaganda which is being disseminated. The public, however, is entitled to know the true supplier of such information in order that they may make intelligent appraisals of vital subjects, and may know when material put before them is biased. As one judge pointed out, "[T]he only conceivable reason for anonymity of political broadcasting" (or for that matter any dissemination of information) "is a purpose of deception, and that purpose is enough to validate a requirement of identification."[13] It appears that the public interest demands that a legislative attempt be made to relieve some of the more flagrant abuses of the technique as represented by this case.

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MUNICIPAL CORPORATIONS — TORTS — LIABILITY FOR NEGLIGENCE IN EXERCISE OF GOVERNMENTAL FUNCTION. — Plaintiff's husband was jailed for drunkeness and died of suffocation as a result of a fire during the absence of the jailer. In an action for wrongful death against the city, the Supreme

4. Legislative Reorganization Act of 1946, 60 Stat. 841, 2 U.S.C. § 267 (1952).
5. 62 Stat. 808 (1948), 18 U.S.C. § 2386 (B) (1) (1952); 52 Stat. 632 (1938), 22 U.S.C. § 612 (1952).
6. Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. § 786 (b) (1952).
7. 48 Stat. 1089 (1934), 47 U.S.C. § 317 (1952).
8. It must be understood, however, that where a combination is formed it is the actual result which governs and not the intent of the parties forming that combination. See United States v. Columbia Steel Co., 334 U.S. 495 (1948).
9. *Cf.* American Tobacco Co. v. United States, 328 U.S. 781 (1946); Nash v. United States, 229 U.S. 373 (1913).
10. Sperry & Hutchinson Co. v. Pommer, 199 Fed. 309 (N.D. N. Y. 1912).
11. Even though not amounting to legal fraud. *Cf.* Federal Trade Comm'n. v. Algoma Lumber Co., 291 U.S. 67 (1934).
12. Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941); Great Northern Ry. Co. v. Commissioner, 40 F.2d 372 (8th Cir. 1930), *cert. denied*, 282 U.S. 855 (1930).
13. Communist Party of the United States v. Subversive Activities Control Board, 223 F.2d 531, 556 (D.C. Cir. 1954), *rev'd for other reasons*, 351 U.S. 115 (1956).

Court of Florida *held* that a municipal corporation is liable for the torts of its agents under the doctrine of respondeat superior when the agent is engaged in a governmental function.[1] *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

Liability is uniformly imposed on a city if the acts of the agent were committed when the agent was in the performance of a proprietary function;[2] however, cities are immunized in the majority of jurisdictions if the act of the agent was committed when the agent was in the performance of a governmental function.[3] This rule apparently stems from the archiac belief that "the King can do no wrong". Early cases reasoned that since a city is also a sovereign, it too should be immune from suit.[4]

Differentiation between governmental and proprietary functions of municipal corporations has offered one mode of restricting the doctrine.[5] Some states and the federal government have enacted legislation which waives governmental immunity.[6] These statutes, coupled with the fact that many courts are avoiding the rule, seem to indicate the current trend to find liability and spread the loss over the entire populous. A type of insurance would provide one methed of accomplishing this end. In the case of a small city it would seem that insurance is essential to the payment of a large judgment. Instead of a small community suffering the loss as the result of a large judgment, the insurance would cushion the shock of a crippling financial blow.

Some rather incongruous results have evolved because of the immunity doctrine. It has been held that a city is liable for the negligent operation of a fire truck, this operation not being a governmental function.[7] In the same state a policeman was in the exercise of a governmental function when he assaulted and falsely arrested an innocent citizen.[8] The courts have gone so far as to suggest that an employee of a city, acting in a governmental capacity, is not actually an agent of a city, but of the public and therefore the doctrine of respondeat superior is inapplicable.[9]

Other countries which have waived immunity are operating with little apparent difficulty.[10] It follows therefore, that the American States should have no fear in this regard. It is submitted that the rule is contrary to the fundamentals upon which our Declaration of Independence is based and is in conflict with our traditional concept of justice, that there should be a remedy for every wrong.[11]

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1. Tallahassee v. Fortune, 3 Fla. 19 (1850) (The court relied on this case which held a city liable for the act of an agent when he was engaged in a governmental function, and thereby felt justified in its apparent contravention of stare decisis.).
2. *E. g.*, Armstrong v. Philadelphia, 249 Pa. 39, 94 Atl. 455 (1915) *Reversed on other grounds.*
3. See McSheridan v. City of Talladega, 243 Ala. 162, 8 So. 2d 831 (1942); Dargan v. Mobile, 31 Ala. 469 (1856); Trammell v. Russellville, 34 Ark. 105 (1877); Holgerson v. City of Devils Lake, 63 N.D. 155, 246 N.W. 641 (1933); Hanson v. Berry, 54 N.D. 487, 209 N.W. 1002 (1926); Betham v. Philadelphia, 196 Pa. 302, 46 Atl. 448 (1900).
4. See Borchard, *Governmental Responsibility in Tort*, VI, 36 Yale L. J. 1, 17 (1926).
5. See 18 McQuillin, Municipal Corporations §§ 53.23-53.24 (3d ed. 1950).
6. Federal Tort Claims Act; N. Y. General Municipal Law § 50-a to 50-d.
7. Maxwell v. Miami, 87 Fla. 107, 100 So. 147 (1924).
8. Brown v. Town of Eustis, 92 Fla. 931, 110 So. 873 (1926).
9. See Williams v. City of Green Cove Springs, 186 Ala. 9, 65 So. 2d 56, 58 (1953) (dissent).
10. Crown Proceedings Act, (1947) 10 & 11 Geo. 6, c.44 § 2.
11. See Williams v. City of Green Cove Springs, 186 Ala. 9, 65 So. 2d 56, 57 (1953) (dissent).