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Torts - Governmental Immunity

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thereunder is determined from the date of exercise. But, under the majority rule, if B were the donee of a general testamentary power and he made the appointments in the same manner, the appointments thereunder are invalid if measured from the creation. But if one analyses the examples in a "restraint of alienation" context, it can be seen that where C is the donee the property is "tied up" for a longer period. This is so because the power *cannot* be *exercised* until 21 years after B's death. Where B is the donee, the power *must* be *exercised,* if at all, under B's will when he dies. Yet, the former is valid and the latter invalid under the majority rule although in the former the property cannot be "brought into the market" until a later period.[23] To so state is inconsistent and permits a scheme to be carried out by some words which cannot be done by others. "[T]here is serious objection to a rule, purporting to express a policy, which declares that this scheme can be carried out by some words and cannot be carried out by others."[24] Such objections can be made to the "majority view" here and it must be concluded that the holding of the court in *Industrial Nat'l Bank v. Barrett* answers such objections and is consistent with obviating the technical harshness of the rule.[25]

Richard S. Dorfzaun

TORTS—Governmental Immunity—The Pennsylvania Supreme Court refuses to abolish the doctrine of sovereign immunity.

Dillon v. York City School Dist., 422 Pa. 103, 220 A.2d 896 (1966).

Plaintiff, a minor, and her guardian brought suit against the defendant for injuries sustained in a fall on the school's icy steps. The trial court sustained a demurrer based on sovereign immunity from tort liability. On appeal the Pennsylvania Supreme Court, in affirming the lower court's order, held that it could not undertake piecemeal judicial reform of a

was invalid *when created.* C was not in being at the creation of the power and it is possible that C would live more than 21 years after the death of A and B and might not be able to exercise the power (he cannot until he dies) until such time. But this problem goes to the validity of a *power when created* and not appointments made under a valid power. See Kales, *supra* note 14, at 64-65.

23. See Thorndike, *supra* note 14, at 715.

24. 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 4, § 24.9.

25. "The Rule persists in personifying itself to me as an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with burst of indecorous energy." Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror* 65 HARV. L. REV. 721, 725 (1952). By its decision, the Supreme Court of Rhode Island has taken a step in clothing the lady in more "modern garb."

See the above cited article generally for some proposed solutions to the problems created by the Rule against Perpetuities. However, it should be noted that although this article is cited in *Barrett*, — R.I. at —, 220 A.2d at 524, one of the problems *not* discussed in the article is that which was before the court.

doctrine which should be abolished by legislative action.[1] Consequently, the court adopted a rationale rejected by other jurisdictions which have abrogated the doctrine of governmental immunity by judicial fiat.[2]

In 1963, the court discarded the doctrine of charitable immunity[3] despite strong objections to a judicial assumption of a legislative function.[4] The adoption of the judicial intrusion argument to sustain the privilege accorded governmental agencies and the rejection of it in abolishing the doctrine of charitable immunity indicates an incongruity which needs clarification.

The *Dillon* majority may be separated into two distinct groups. One segment has uniformly recommended legislative action in both areas,[5] *i.e.*, governmental and charitable immunity, while the second is comprised of those justices who rejected the judicial intrusion argument in abolishing the privilege granted to charities and accepted it in sustaining governmental immunity.[6]

An analysis of the four-fold rationale[7] of the *Flagiello* case,[8] which abolished the doctrine of charitable immunity fails to provide a rational justification for this latter position. The most important step in the rationale of *Flagiello* was the rejection of the theoretical validity of the concept of charitable immunity.[9] Modern justification for the doctrine of governmental immunity has also been criticized by numerous other jurisdictions[10] and legal writers.[11] Moreover, the Pennsylvania Supreme

1. 422 Pa. at 105, 220 A.2d at 898.

2. In Molitor v. Kaneland Community Dist., 18 Ill.2d 11, 25, 163 N.E.2d 89, 96 (1959), the court stated that "having found that doctrine (*i.e.* governmental immunity) to be unsound and unjust under present conditions, we consider that we have not only the right but the duty to abolish that doctrine." See also Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1960), and Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962), where the doctrine was overruled prospectively.

3. The doctrine of charitable immunity protected charitable institutions from liability for torts committed by their employees. Sidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 416, 45 A.2d 59, 62 (1946).

4. Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 519, 532, 208 A.2d 193, 210, 216 (1965), where Chief Justice Bell and Justice Jones dissented and urged that legislative action, not judicial reform, was the proper tool to abolish charitable immunity.

5. This group is comprised of Chief Justice Bell and Justice Jones. See discussion in note 4 *supra*.

6. This group is composed of Justice Cohen and Justice O'Brien. In the *Flagiello* case, Justice O'Brien joined in the majority opinion whereas Justice Cohen filed a concurring opinion stating his basis for abolishing the doctrine of charitable immunity.

7. Comment, 26 U. PITT. L. REV. 749, 754 (1965).

8. Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 208 A.2d 193 (1965).

9. *Cf.* comment cited note 7 *supra*.

10. See cases cited note 2 *supra*.

11. Proposals set forth to justify the retention of the doctrine have been varied. They have included assertions that immunity should be granted to a governmental agency because torts are never authorized and are, therefore, ultra vires. However, the ultra vires doctrine

Court itself has admitted that the errors in logic which spawned the doctrine have been exposed.[12] Secondly, *Flagiello* conceded that immunity works an injustice by compelling injured parties to bear the loss occasioned by another's negligence.[13] While discussing this facet of the opinion the court acknowledged that government would mean very little if it exempted portions of the population from liability on the theory that the public right transcends the claim of the individual.[14] As it is, the immunity granted to governmental agencies works injustice by relieving a wrongdoer from liability. Application of the concept would also generate disrespect for a government which almost arbitrarily denies recovery in certain instances while allowing compensation in others.[15] Thirdly, *Flagiello* stated that the abolition of the doctrine of charitable immunity would induce greater care on the part of protected institutions.[16] If the threat of liability would have that effect on charities, no reason is apparent why such a menace would not have an equivalent influence on sheltered governmental agencies. This factor assumes greater significance in view of government's expanding involvement with society. Finally, *Flagiello* indicated that the court never had the prerogative to establish a blanket immunity because this form of privilege is opposed to the tenets of a democratic society.[17] The principle of governmental immunity is similarly a judicially innovated[18] blanket exemption, and its retention would, likewise, seem offensive to a democratic system. An anlysis of the *Flagiello* decision fails to expose any foundation for the court's retention of the

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has prevented liability only when the tortious act was committed outside the authority delegated to the employee. The supposed lack of a corporate fund has also been advanced as a reason for retention. This had been construed as a carry-over from the area of charitable immunity. Since the trust fund theory is insufficient to justify the doctrine of charitable immunity, it should not be advanced in support of governmental immunity. Fuller and Casner, *Municipal Tort Liability In Operation*, 54 HARV. L. REV. 437, 438-441 (1941). The doctrine of governmental immunity has been criticized as resting upon a misinterpretation of the sovereignty of the king and anomalous when applied in the United States. Borchard, *Governmental Immunity In Tort*, 34 YALE L.J. 1, 4-5 (1924). See also Borchard, *Governmental Immunity In Tort*, 36 YALE L.J. 1 (1928), Comment, 4 DUQUESNE L. REV. 441 (1966).

12. In Morris v. Mount Lebanon School Dist., 393 Pa. 633, 635, 144 A.2d 737, 738 (1958), the court stated that the errors in history, logic and policy which gave rise to the doctrine have been exposed.

13. 417 Pa. at 506, 208 A.2d at 203.

14. *Ibid.*

15. An individual may recover from the government if the tort is committed by an employee engaged in a proprietary as distinguished from governmental function. In Morris v. Mount Lebanon School Dist., 393 Pa. 633, 637, 144 A.2d 737, 739 (1958), the court stated that "perhaps there is no issue known to the law which is surrounded by more confusion than the question whether a given municipal operation is governmental or proprietary in nature."

16. 417 Pa. at 504-505, 208 A.2d at 202.

17. *Id.* at 504, 208 A.2d at 202.

18. The doctrine of governmental tort immunity was introduced into Pennsylvania law by the case of Fox v. Northern Lights, 3 W. & S. 103 (1841).

immunity accorded governmental agencies after withdrawing the privilege from charitable institutions.

Inquiry into Justice Cohen's concurring opinion in *Flagiello*[19] fails to reconcile the apparent inconsistency in the court's position. He relied primarily on the Michigan case of *Parker v. Port Huron Hosp.*[20] *Parker* recognized the fact that the doctrine of charitable immunity had been judicially assimilated, and therefore, could be dismantled by judicial fiat.[21] In abolishing charitable immunity *Parker* negated the stare decisis argument by holding that the maxim was not meant to perpetuate error.[22] This rationale is equally applicable in the area of governmental immunity.

Accordingly, some persuasion not present in the case of charitable immunity must be found in order to sustain the position of the court in *Dillon*. Although not enunciated, this component may originate in the complexity of the reform required to effect abolition.[23] The essence of this complexity is not, however, defined. It is submitted that this definition was omitted because the nature of the reform required to abolish governmental immunity is indistinguishable from the action which was initiated with *Flagiello*. The abrogation of governmental immunity would impose liability on many previously sheltered governmental agencies just as the withdrawal of the privilege accorded charities imposed liability on many previously insulated charitable institutions.[24]

A final rationale proposed by some jurists involves an interpretation of legislative inactivity. It has been asserted that the failure of a legislature to act upon a bill which is before it expresses an intent to leave the law as it stands.[25] In 1961, a bill providing for partial waiver of the Commonwealth's tort immunity died in committee.[26] This inaction could be interpreted as a desire of the people to retain the doctrine. However, the court did not adopt this argument with respect to charitable immunity after a bill to abolish that privilege likewise died in committee in 1961.[27]

Past action of the court in other areas fails to provide an answer for

19. 417 Pa. at 515, 208 A.2d at 208.

20. Parker v. Port Huron Hosp., 366 Mich. 1, 105 N.W.2d 1 (1960).

21. *Id.* at 11, 105 N.W.2d at 6.

22. *Id.* at 10, 105 N.W.2d at 6.

23. In *Dillon*, 422 Pa. at 106, 220 A.2d at 898, the court intimates that this is a distinguishing factor when it speaks of the complexity of the reform which would be required.

24. The doctrine of charitable immunity extended protection to institutions other than hospitals. Included within the definition of charitable institutions were religious, educational and cemetery organizations and the Young Men's Christian Association. 14 C.J.S. *Charities* § 2 (1939).

25. In Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 223, 11 Cal. Rptr. 89, 96, 359 P.2d 457, 464 (1960), Justice Schauer, in dissent, stated that the failure of a legislature to change a law which is generally before it . . . is indicative of an intent to leave the law as it stands.

26. Pa. H.R. Res. 75, Gen. Assembly, 145th Sess. (1961).

27. Pa. S. Res. 59, Gen. Assembly, 145th Sess. (1961).

its refusal to abolish governmental immunity after it had abrogated the immunity accorded to charities. This analysis reveals an actual incongruity in maintaining a rule which imposes hardship on injured parties and perpetuates a deleterious doctrine.

John R. McGinley, Jr.

TORTS—Products Liability—Restatement (Second), Torts, § 402(A)—The Pennsylvania Supreme Court adopts a strict tort liability rule for the products liability area.

Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

Plaintiff brought an action in trespass against a beer distributor, brewer, and manufacturer for injuries resulting from the explosion of a beer keg which had been purchased by plaintiff's father. Plaintiff relied on a theory of exclusive control and the trial court dismissed the complaint because all parties whose conduct could have affected the condition of the keg had not been joined as defendants.[1] This judgment was vacated and plaintiff was given leave to amend his complaint and proceed on a theory of strict liability.[2]

The court decided the case not on the doctrine of exclusive control but on the more determinative issue of "the nature and scope of the liability in trespass of one who produces or markets a defective product for use or consumption."[3] With one dissent, the court followed the modern trend toward strict liability by adopting Section 402(A)[4] of the Restatement

1. The plaintiff's father and brother who had handled the keg were not joined as defendants and were unable to be joined because the Statute of Limitations had run. PA. STAT. ANN. tit. 12, § 34 (1953).

2. Chief Justice Bell, dissenting, sharply criticised the court for allowing plaintiff to proceed on a theory not pleaded by him. Webb v. Zern, 422 Pa. 424, 429, 220 A.2d 853, 859 (1966). Although a strict products liability theory was not pleaded, plaintiff did urge the adoption of Section 402(A) in a supplemental brief. Supplemental Brief for Appellant.

3. 422 Pa. at 425, 220 A.2d at 854.

4. RESTATEMENT (SECOND), TORTS, 402(A) (1965):

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relationships with the seller.