Montana Law Review

Volume 8
Issue 1 *Spring 1947*

Article 4

1947

Tort Liability of the State Highway Commissioners

Robert C. Sykes

R. C. M. 5813 and Dahlman v. Dahlman were cited by Mr. Justice Holloway in support of his statement. The fact that the common-law right of dower is preserved in this state by §5813, was reiterated in Swartz v. Smole;[21] and Dahlman v. Dahlman was recently cited as an authority in the case of Mathey v. Mathey, which proclaimed,

> "The holding in the Dahlman case has been a rule of property in Montana for more than thirty-five years."[22]

From the foregoing opinions and authorities it is difficult to escape the conclusion that §5813 preserves the dower right as it existed at the common law.[23]

In view of the increasing proportion of personal property in relation to real property, it is submitted that §5813 should be amended to increase the widow's dower interest to an absolute one-third share of both the real and personal property possessed by the husband during the marriage, thus conforming to the more modern and liberal concepts of statutory dower.

William G. Mouat

[21]Swartz v. Smole (1931) 91 Mont. 95, 5 P. (2d) 566.
[22]Mathey v. Mathey et al. (1939) 109 Mont. 476, 98 P. (2d) 373.
[23]Dower is not in any sense an estate until assigned; the widow not being vested with the title or possession.

TORT LIABILITY OF THE STATE HIGHWAY COMMISSIONERS

A recent Montana case involves an interesting question as to whether members of the State Highway Commission are individually liable for injuries incurred in an automobile which overturned on an oil-surfaced state highway, which was in need of repair, in slippery condition and where no warning signs had been erected. In *Coldwater v. State Highway Commission,*[1] the plaintiff's complaint alleged the following facts pertinent to this question:

1. The commissioners applied oil to the road surface, knowing such oil was unsuitable for that purpose.
2. The defective condition of the road had existed for such a time that the commissioners knew or should have known of such fact, and the commissioners failed to repair the highway.

[1](1945) ..... Mont. ....., 162 P. (2d) 772.

3. The commissioners negligently failed to erect signs warning motorists of the road's condition.

Ruling on a demurrer to the complaint, the majority of the Montana Supreme Court took the position that the crux of the complaint was negligence in failing to repair the highway and place proper warning signs thereon, and that these duties were discretionary in nature and not ministerial. The court also said, apparently as a sort of afterthought, that the complaint failed to allege actual notice or facts charging he defendants with notice of the defective conditions. For these reasons the court upheld the demurrer. Justice Angstman, in a vigorous dissent, declared that the complaint alleged a misfeasance, which if supported by proof would render the commissioners liable.[2]

The first point to be considered is the fact that the public duties involved[3] are imposed upon the commission by the statutes.[4] One could very well argue that any violation of the statute would be a violation of the commission as a body and not of the individual members thereof, and any liability resulting from a statutory violation is that of the commission. This question has seldom been presented to the courts for adjudication, but in *Monnier v. Godbold*,[5] the state pharmacy board of the state of Louisiana (the members of which were appointed by the governor) refused to grant a certificate to an applicant who was legally entitled to one. The court denied any individual liability on the grounds that the duties of granting a certificate to practice pharmacy were corporate and not individual. The Louisiana court reasoned that refusal to exercise the power of such a body was a refusal of the body and not of the members composing it, since the official action of its members was merged into the official action of the board itself as an entity. Prior to any statute imposing a liability on county commissioners for failure to repair highways and remove ob-

[2]The court also unanimously held that the commission itself was immune from liability since the state's immunity extends to the boards, commissions and agencies through which the state must act.

[3]The absolute privilege against individual liability enjoyed by judicial officers, legislators and high executive officers does not apply to administrative officials. See Wallace v. Feehan (1934) 206 Ind. 522, 190 N.E. 438; PROSSER, TORTS (1941) §108, p. 1076; Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

[4]R.C.M. 1935 §1788 requires the commission in conjunction with the board of county commissioners to formulate necessary rules and regulations for the construction, repair, maintenance and marking of state highways and bridges; R.C.M. 1935 §1793 provides that the commission shall erect and maintain such standard guides and warning signs as it may deem necessary on and along state highways.

[5](1906) 116 La. 165, 40 So. 604, 7 Ann. Cas. 768, 5 L.R.A. (N.S) 463.

structions to bridges, the Montana Supreme Court on rehearing in *Smith v. Zimmer*[6] impliedly rejected application of the *Godbold* case to administrative officials. Justice Smith, writing for the majority of the court, said:

> "When an office is held by a single individual, notice to him prsonally is ordinarily notice to him officially. But when a duty devolves upon a board which has sole power to act, and not upon its individual members, in order to put the board or its members, in error or default, notice must be served upon the board; that is, actual notice must come to its members while convened officially.'"[7]

Becker v. Chapple[8] was a case decided after the duty of repairing highways and removing obstructions to bridges was imposed upon the county commissioners by statute.[9] The court clarified the confusion which arose from the *Zimmer* case by declaring that the county commissioners would be liable whether knowledge was gained by them as individuals or in their official capacities. It seems, therefore, that in Montana members of the State Highway Commission may be held liable for violation of statutory duties, even though the duties are imposed upon the commission as distinguished from the members thereof.[10]

It should be noted that the above mentioned Montana cases held there would be no liability in the absence of actual knowledge of the defective conditions. In *Laird v. Berthelote,*[11] however, the court held actual knowledge of defects in a highway could be imputed to the county commissioners if the defects had existed over an extensive period of time. And the majority of the court in the *Coldwater* case recognized this rule when they said:

[6](1912) 45 Mont. 282, 125 P. 420.
[7]Chief Justice Brantly dissented on the grounds that knowledge gained as an individual rendered the county commissioners liable for failure to act with that degree of diligence which the circumstances demanded.
[8](1924) 72 Mont. 199, 232 P. 538.
[9]R.C.M. 1921 §1627 provided that county commissioners shall be liable for wilfull, intentional neglect, or failure to remove defects and obstructions in highways; R.C.M. 1921 §4520 provided, among other matters, the right of any person injured by the acts of the county commissioners to recover for all damages sustained. As to the present duties of county commissioners, see R.C.M. 1935 §4465.3; and as to their individual liabilities, see R.C.M. 1935 §4520.
[10]It is suggested that statutes dealing with administrative boards and officials should avoid this technicality by setting forth the duties of the members of the board, since the *Godbold* case could be made a shield to protect careless administrative officials from the natural results of the improper performance of their public duties.
[11](1922) 63 Mont. 122, 206 P. 445.

> "The complaint does not allege actual notice of the defective conditions by the defendants, neither does it allege facts charging them with notice thereof."

Apparently the majority of the court in the *Coldwater* case overlooked the allegations of the complaint that charged the commissioners with knowledge of the unsuitability of the oil for road surfacing and constructive notice of the defective conditions of the highway.

According to the weight of authority, public officials are liable for improper performance of ministerial as distinct from discretionary duties.[12] A few courts limit this rule by holding there is no liability for a nonfeasance.[13] However, the great majority of decisions impose an absolute liability upon an officer who fails or refuses to perform a ministerial duty, and a reasonable and honest mistake as to his duty is no excuse.[14]

A ministerial duty has been defined as a specific and positive duty required by law,[15] but the distinction between such a duty and a discretionary duty has been criticized for the following reasons:

> 1. Present day legislation has become so technical and complicated and covers such a wide field that the public officials have a difficult time determining just what their ministerial duties entail.[16]

[12]Amy v. Desmoines County Supervisors (1870) 11 Wall. 136, 78 U. S. 136, 20 L. Ed. 101; Worden v. Witt (1895) 4 Idaho 404, 39 P. 1114; Moffitt v. Davis (1934) 205 N.C. 565, 172 S.E. 317; see counties, 20 C.J.S. 884. In his dissent in the *Coldwater* case, Justice Angstman declared that the weight of authority holds a public officer liable for a nonfeasance. Apparently Justice Angstman intended to state the rule as to the tort liability of an administrative official for failure to perform a ministerial duty since 40 A.L.R. 36, the authority he cited for the rule, says, ". . . most of the jurisdiction hold that a public officer is liable for personal injuries resulting from his negligence, where the duty imposed on him of keeping the streets or highways in repair is ministerial in character, but not judicial or discretionary."

[13]Smith v. Iowa City (1931) 213 Iowa 391, 239 N.W. 29; Stevens v. North States Motor (1925) 161 Minn. 345, 201 N.W. 435; Binkley v. Hughes (1934) 168 Tenn. 86, 73 S.W. (2d) 1111.

[14]Amy v. Desmoines County Supervisors (1870) 11 Wall. 136, 78 U. S. 136, 20 L. Ed. 101; First Nat. Bank v. Filer (1933) 107 Fla. 526, 145 So. 204, 87 A.L.R. 267; Consolidated Apartment House Co. v. Baltimore (1917) 131 Md. 523, 102 A. 920, L.R.A. 1918C 1181; Strong v. Day (1916) 61 Okla. 166, 160 P. 722, L.R.A. 1917B 369; Clark v. Kelly (1926) 101 W. Va. 650, 133 S.E. 365, 46 A.L.R. 799; 43 Am. Juris., Public Officers §282, p. 96; 153 A.L.R. 132.

[15]Title Guaranty & Surety Co. v. Commissioners (1911) 141 Ky. 570, 133 S.W. 577; Mohnihan v. Todd (1905) 188 Mass. 301, 74 N.E. 367, 108 A.L.R. 473; Tholkes v. Decock (1914) 125 Minn. 567, 147 N.W. 648, 52 L.R.A. (N.S.) 142.

[16]See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

2. "It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[17]

3. One court may classify a duty as ministerial; another may classify the same duty as discretionary.[18]

But courts continue to distinguish between ministerial and discretionary duties; and if the public official is not bound to perform any specific and positive duty, the courts are reluctant to interfere with him.[19] The majority of courts impose liability upon a public administrative official who exercises discretionary duties only when he is guilty of malice, wilfulness or corruptness.[20] His privilege is said to be a qualified one. The courts apply this rule regardless of whether the alleged act was a "misfeasance" or a "nonfeasance." The distinction between misfeasance and nonfeasance has long been abandoned by the courts, as too difficult to maintain, when the action of assumpsit is involved.[21] Since a public officer may act wilfully, corruptly or maliciously, regardless of whether his action be termed a misfeasance or a nonfeasance, a rule imposing liability for misfeasance only would not seem to afford adequate protection to

[17]Ham. v. Los Angeles County (1920) 46 Cal. App. 148, 162, 189 P. 462, 468. See PROSSER, TORTS (1941) §108, pp. 1078, 1079.

[18]An auditor's duty of issuing and paying warrants was held to be a ministerial duty in Fergus v. Brady (1917) 277 Ill. 272, 115 N.E. 393, Ann. Cas. 1918B 220; and it was held discretionary in Hicks v. Davis (1917) 100 Kan. 4, 163 P. 799.

[19]Wadsworth v. Middleton (1920) 94 Conn. 435, 109 A. 246; Dennis v. Osborn (1907) 75 Kan. 557, 89 P. 925: Blundon v. Crosier (1901) 93 Md. 355, 49 A. 1; Le Moyne v. Washington County (1905) 213 Pa. 123, 62 A. 516.

[20]Fidelity & Casualty Co. of New York v. Brightman (C.C.A. 8th 1931) 53 F. (2d) 161; Gladstone v. Galton (C.C.A. 9th 1944) 145 F. (2d) 742; Paoli v. Mason (1945) 325 Ill. App. 197, 59 N.E. (2d) 499; Wallace v. Feehan (1934) 206 Ind. 522, 190 N.E. 438; Hedgepeth v. Swanson (1943) 223 N.C. 442, 27 S.E. (2d) 122; see PROSSER, TORTS (1941) §108, p. 1077; Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

[21]"It is difficult to fix the line of definition between misfeasance and mere nonfeasance, the same conduct may be both. When the carpenter left a hole in the roof, his default was in strict literality only a nonfeasance; but the indignant householder would consider the spoiling of his goods due to a positive piece of misconduct. And so the judges had, before the middle of the fifteenth century, came to think. After that point it was hard to preserve the distinction between incomplete performance and pure non-performance." KEIGWIN, CASES IN COMMON LAW PLEADING pp. 177, 178. "The distinction between misfeasance and nonfeasance in the case of promises for money was altogether too shadowy to be maintained." Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

the public, although, of course, it would be a boon to a malicious or corrupt official.

It is submitted, however, that a public official, regardless of whether his duties are ministerial or discretionary, should be liable whenever he acts or fails to act and whether the act or omission is either unreasonable or in bad faith. This is the rule adopted by the Restatement.[22] It may be argued that such a rule would result in a refusal of people to accept a public office, in a reckless expenditure of public funds to avoid liability, and in a failure of public officials to give proper weight to the public interest when called upon to exercise discretion. However, such arguments overlook the following facts:

1. Every public official is presumed to have performed his duties properly until proved otherwise.[23]
2. The preclusion of reasonable action and honest intentions as defenses where the public official's duty is "ministerial," places an undue hardship upon him.
3. Since public officials may be, and usually are, required by statute to furnish bonds conditioned upon faithful performance, the public officials would be nothing out of pocket, though the act or inaction be what has been labelled "discretionary."

In conclusion, since the law as to tort liability of highway officials and other public officials is still in the process of development, it would seem desirable that the Montana Supreme Court consider the application of the Restatement rule. In any event, it is respectfully submitted that the holding in the *Coldwater* case was not justified, in view of the allegations of the complaint with respect to the personal misdeeds of the defendants.[24]

Robert C. Sykes

[22]RESTATEMENT, TORTS §265. For advocacy of this test see PROSSER, TORTS (1941) §108, p. 1079; Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

[23]Chilten v. Metcalf et al (1911) 234 Mo. 27, 136 S.W. 701.
R.C.M. 1935 §1783 provides that each highway commissioner shall give bond conditioned upon the faithful performance of his duties in the sum of ten thousand dollars; in regard to official bonds, see R.C.M. 1935 §§464-473.

[24]The complaint alleged the commissioners themselves applied the oil, knowing it was unsuitable for the purpose of surfacing highways. If the facts sustained the allegation, the commissioners were guilty of a wilfull act for which the present rules impose liability.
Justice Angstman declared the consideration of the doctrine of respondeat superior was premature because the rendering of the decision on the demurrer required no such consideration. The general view is that the doctrine of respondeat superior does not apply to a subordinate appointed by a public official, unless the official himself is re-