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## Municipal Liability: Refusal to Impute Punitive Damages to a Municipal Corporation for the Intentional Tort of an Employee

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**MUNICIPAL LIABILITY: REFUSAL TO IMPUTE PUNITIVE DAMAGES TO A MUNICIPAL CORPORATION FOR THE INTENTIONAL TORT OF AN EMPLOYEE—*Williams v. City of New York*, 508 F.2d 356 (2d Cir. 1974).**

In *Williams v. City of New York*<sup>1</sup> the Second Circuit Court of Appeals denied an award of exemplary damages in a suit for malicious prosecution citing as authority numerous New York state cases. New York's common law has refused to award punitive damages against a municipal corporation.<sup>2</sup>

Samuel Tito Williams was arrested in 1947 and accused in the murder of a young black girl. Williams' guilt was established at trial almost solely by the admission of a confession obtained in a lengthy police custodial interrogation.<sup>3</sup> The jury necessarily found in convicting him of murder that his confession was voluntarily given.<sup>4</sup>

Prior to a federal habeas corpus decision in his favor, Williams filed a suit for wrongful arrest and for malicious prosecution against the city of New York.<sup>5</sup> He alleged that the city's agents (the police department) maliciously prosecuted him in 1947 when he was arrested and charged without probable cause. He further alleged that the police interrogators coerced his confession with a brutal beating and a lengthy interrogation. The jury awarded a verdict in favor of the plaintiff, in the amount of \$40,000 in compensatory damages and \$80,000 in punitive damages. It was this award of punitive damages that was reversed as a matter of law by the Second Circuit.<sup>6</sup>

In the discussion that follows, this case note will examine the

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1. 508 F.2d 356 (2d Cir. 1974).

2. Cf. *Costich v. City of Rochester*, 68 App. Div. 623, 73 N.Y.S. 835 (4th Dep't 1902); *Eifert v. Bush*, 27 App. Div. 2d 950, 279 N.Y.S.2d 368 (1967); *Seifert v. City of Brooklyn*, 101 N.Y. 136 (1886); *Cohen v. Mayor*, 113 N.Y. 532 (1889); *Lee v. Village of Sandy Hill*, 40 N.Y. 442 (1869); *Speir v. City of Brooklyn*, 139 N.Y. 6 (1893).

3. Williams sought numerous avenues of appeal at both the state and the federal level. All of these attempts were to no avail. After the case of *Haynes v. Washington*, 373 U.S. 503 (1963), in which the Supreme Court broadened the concept of voluntariness and insisted that the trial court exercise more control over the admissions of confessions, Williams successfully appealed to the Second Circuit obtaining a writ of habeas corpus. *United States ex rel. Williams v. Fay*, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915 (1964).

4. Under New York law prevailing at the time of Williams' trial, the issue of the voluntariness of a confession was given to the jury as a separate question. This procedure has been declared unconstitutional in the case of *Jackson v. Denno*, 378 U.S. 368 (1964).

5. At the time of the arrest Williams was 18 and a resident of the city of New York. The federal jurisdiction was based upon diversity and although it was not at issue in this appeal it is difficult to ascertain how diversity can be justified given the parties in this case.

6. For a more detailed discussion of the facts and the history of this case see *United States ex rel. Williams v. Fay*, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915 (1964).

application of New York state common law to this factual situation and ascertain whether that law was properly applied. This note will also attempt to examine the public policy ramifications involved in the court's denial of punitive damages against municipal corporations and offer possible alternative solutions for the courts to follow when faced with similar issues.

To date American courts have almost universally refused to award punitive damages against a municipal corporation.<sup>7</sup> This, however, has not been the case when compensatory damages are involved.<sup>8</sup> Many jurisdictions have eliminated the traditional distinction between governmental and proprietary functions<sup>9</sup> and have allowed compensatory damages regardless of the nature of the tort.<sup>10</sup> It is important to realize that these courts have continued to disallow and overrule awards of exemplary damages, even when the employee's tort is intentional.<sup>11</sup>

The Second Circuit was faced with the question of whether to

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7. For those cases so holding see ANNOT., 19 A.L.R.2d 903, 908 (1951).

8. The barrier forbidding awards of compensatory damages was first hurdled in *City of Meridian v. Beeman*, 175 Miss. 527, 166 So. 757 (1936).

Although arguably the case is decided correctly it defies a logical explanation. In *Beeman*, the court held that the proximate cause of the traffic accident between the plaintiff and the police cruiser was the failure of the police department to report defective street conditions to the proper highway agency. See note 9 *infra*.

9. The traditional duality of a municipal corporation has been distorted by almost every jurisdiction. The dichotomy is defined, but is not readily understood, by determining whether the function performed is *governmental* or *proprietary*. *Bailey v. City of New York*, 3 Hill 531 (1842). If the function is *governmental*, there can be no tort liability regardless of whether the act is intentional, negligent, ratified or authorized. The rationale is that the city cannot function if money raised from taxing is used to pay tort claims. See generally W. PROSSER, *TORTS*, § 131, at 977-84 (4th ed. 1971); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

On the other hand if the function is *proprietary* then tort liability attaches. That is, if the service can be performed as easily by a private concern it is deemed proprietary. *Borchard, Government Liability in Tort*, 34 YALE L.J. 1 (1924); Harno, *Tort Immunity of Municipal Corporations*, 41 ILL. L.Q. 28 (1921); Shapiro, *Municipal Liability for Police Torts*, 17 U. MIAMI L. REV. 475 (1963).

Police and police departments are ordinarily included within the protection of governmental functions and were therefore immune from torts.

10. Following the persuasive authority in *Beeman*, the Supreme Court of Florida in *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) refused to pass the immunity issue onto the legislature and imposed liability upon a municipal corporation for the negligent tort of the employee in a governmental function. For the Florida jurisdiction this has eliminated the distinction between governmental and proprietary functions.

11. In addressing a question similar to the *Williams* issue, the Florida court allowed compensatory damages against a municipal corporation based upon an intentional tort but then reversed an award of punitive damages. *Simpson v. City of Miami*, 155 So. 2d 829 (Fla. Dist. Ct. App. 1963). This is perhaps the initial case where an award of compensatory damages was allowed against a municipal corporation for the *intentional* tort of an employee in a governmental function.

allow an award of punitive damages against the city of New York.<sup>12</sup> The court began its discussion with an explanation of the requirements needed to award punitive damages against a private corporation, *i.e.*, a discussion of the need for ratification and/or complicity by an executive or a person of authority.<sup>13</sup> The court held that this criterion must be met by the plaintiff to award punitive damages. And, since these allegations were not substantiated by Williams, the exemplary award must be reversed.<sup>14</sup> The problem with this discussion is that a simple adherence to the common law rule, that punitive damages cannot be awarded against a corporate municipality, would have achieved the same end and would have done so with far less confusion.<sup>15</sup>

Whether the Second Circuit's approach effected a mistaken application of New York's common law or was, indeed, deliberate, this decision is significant. It virtually eliminates the distinction between governmental and proprietary functions and makes municipal corporations liable in the same way and under the same circumstances as would a private corporation.<sup>16</sup> On the strength of the court's approach it could easily be argued in a future case that with a showing of ratification or complicity by a *managerial police officer* (the court implies a sergeant or a lieutenant)<sup>17</sup> a plaintiff could collect an award of punitive damages for an intentional tort committed by a municipal employee.

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12. 508 F.2d at 360-61.

13. In a majority of jurisdictions, punitive damages may be awarded against a private corporation for the intentional tort of its agents. These jurisdictions are divided by the quantum of participation required at the managerial level. In the majority punitive damages may be awarded without any participation by the principal or any need for any subsequent ratification. *See Clemons v. Life Ins. Co.*, 274 N.C. 416, 163 S.E.2d 761 (1968); *Joab, Inc. v. Thrall*, 245 So. 2d 291 (Fla. Dist. Ct. App. 1971); *Ray Dodge Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Johnson v. Allen*, 448 S.W.2d 265 (Mo. Ct. App. 1969).

In a growing minority of jurisdictions of which New York is a member, the corporation through its upper managerial executives must have taken part in the intentional tort, authorized it or subsequently ratified the agent's behavior. *See Freeman v. Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963); *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 265 A.2d 404 (1970); *Richter v. Plains Nat'l Bank*, 479 S.W.2d 95 (Tex. Civ. App. 1972); *Ebaugh v. Rabkin*, 22 Cal. App. 3d 891, 99 Cal. Rptr. 706 (1972); *Parris v. St. Johnsbury Trucking Co.*, 395 F.2d 543 (2d Cir. 1968). *New York: Davey v. D. and Z. Foods, Inc.*, 21 App. Div. 2d 860, 250 N.Y.S.2d 1018 (1st Dep't 1964); *Krasnor v. Horn & Hardart Co.*, \_\_\_ Misc. \_\_\_, 146 N.Y.S.2d 540 (App. Div. 1st Dep't 1955).

14. 508 F.2d at 361.

15. *See note 2 supra.*

16. Although the Second Circuit inferred in their discussion that it may not be possible to award punitive damages against the city of New York, a narrow decision based upon New York common law would have answered the question with far less confusion. The discussion of the need for managerial complicity or ratification was unnecessary.

17. 508 F.2d at 361.

This confusion is heightened by examining the court's concern in the testimony surrounding the plaintiff's attempt to show complicity.<sup>18</sup> It appears that the jury could have reasonably found as a matter of fact that the tortious acts of the police interrogators were sanctioned or ratified by the proper police official.<sup>19</sup> The court held, however, as a matter of law that the plaintiff failed to establish the required nexus between the interrogators and someone in authority at the police department.<sup>20</sup> The implication appears to be that if such a causal connection was established the plaintiff would have approached the burden of proof and punitive damages could have been granted. It is interesting that, while the Second Circuit's discussion of complicity and/or ratification is not applicable for the disposition of the case, the court properly concluded that punitive damages should not be awarded under New York common law.<sup>21</sup>

Conceding the possibility that the Second Circuit consciously extended intentional tort liability, it is important to look to the merits and the wisdom of this extension. Is it sound public policy for a municipal corporation to be liable for the intentional torts of its employees upon a showing of complicity or ratification by a person of authority?<sup>22</sup>

In an attempt to answer this question it is important initially to examine whether there is an analogy between a private corporation and a municipal corporation. If so, are these similarities important in clarifying the issue of punitive liability against a municipality?

Awards of punitive damages against a municipality for the in-

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18. The Court quoted the following testimony from the Record:  
"By Mr. Walls:

Q. Were there any superior officers in the precinct house at any time that you were aware of, by that I mean lieutenant or a sergeant.

The Court [sic]: I didn't, no sir, none until they made me sign the confession.

Then they brought some big men in there. That is all I know."

508 F.2d at 361, n. 3.

19. The plaintiff, Williams, was interrogated for some 18 hours and was brutally beaten in order to obtain a confession. It seems almost inconceivable that no commanding officer had any contemporaneous knowledge of the methods used by the interrogators.

20. The court points to the transcript at 171-72 in an attempt to demonstrate that the failure to establish the causal link was the fault of plaintiff's counsel. In summation, "Counsel elaborates upon client's lost employment opportunities and pain and suffering, but makes no mention whatsoever of any part by department superiors in engendering this loss." 508 F.2d at 361 n. 4.

21. See note 2 *supra*.

22. Private corporate liability in intentional torts is closely divided: the majority allowing punitive damages without managerial knowledge or ratification; the minority requiring knowledge or ratification. Since New York follows the minority, this discussion will center on ratification. See note 9 *supra*.

tentional torts of its employees appears to be analogous and follow logically from the private corporation situation. In some respects there are similarities but by a close examination the analogy breaks down.

It has been argued by numerous scholars that compensatory awards in intentional torts generally are sufficient to deter private corporations and awards should be limited as such unless there is a subsequent ratification or complicity in the tortious act.<sup>23</sup> To allow punitive awards in actuality works only an injustice on the corporate shareholders. This is primarily because exemplary damages are generally uninsurable and consequently any punitive awards must be taken directly from corporate assets.<sup>24</sup> The shareholders are directly affected by diminished dividends and most probably cannot be shown to be culpable or morally blameworthy. Judicial considerations suggest that these shareholders should not suffer since in the majority of cases they have not benefited by the tort and their power over corporate management in many instances is very limited.<sup>25</sup>

The discussion is thrown into a new light when the intentional tort is shown to have been committed with the knowledge, consent or ratification of a corporate executive. The concern for the shareholder must be overshadowed by the need to deter and prevent such activity from recurring. The sanctions imposed must be severe and serve as a reminder to the individual corporation as well as other corporations that such anti-social behavior cannot be tolerated.<sup>26</sup>

The harsh penalty of punitive damages should be a catalyst to those executives in authority, forcing them to reexamine corporate policies in the areas of supervision, control and hiring practices.<sup>27</sup> As

23. Rice, *Exemplary Damages In Private Consumer Actions*, 55 IOWA L. REV. 307 (1969); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966); Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961); Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

24. *Arnold v. State ex rel. Burton* 220 Ark. 25, 245 S.W.2d 818 (1952); *Tedesco v. Maryland Cas. Co.*, 127 Conn. 533, 18 A.2d 357 (1941); Morris, *Punitive Damages In Personal Injury Cases*, 21 OHIO ST. L.J. 216 (1960); Comment, *Insurer's Liability for Punitive Damages*, 14 MO. L. REV. 175 (1949); Note, *Insurance Coverage and Punitive Award in Automobile Accident Suit*, 19 U. PITT. L. REV. 144 (1957).

25. BALLANTINE, CORPORATIONS §§ 42, 43 185-88 (1946).

26. The imposition of a *civil punishment* results in a private award rather than a public fine. It is important to note that the defendants' traditional safeguards in *punishment* situations may not be adequately protected. He is subject to cross-examination, self-incrimination and a standard below that of *beyond a reasonable doubt*. *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 25 P. 1072 (1891); Alldridge, *The Indiana Doctrine of Exemplary Damages And Double Jeopardy*, 20 IND. L.J. 123 (1945); Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927).

27. New York State follows the rule that ratification or complicity is required by the principal. This appears to be the preferred rule. Note, *The Imposition of Punishment By Civil*

a direct and necessary result in the re-evaluation the responsible employee should suffer the loss of employment.<sup>28</sup>

There are some obvious similarities in municipal and private corporate structure that are analogous to the previous discussion. For example, both shareholders and taxpayers are directly affected by punitive awards.<sup>29</sup> In addition shareholders and taxpayers have a voting right and consequently a determination in the corporate process. It is true, however, that a shareholder in many instances participates to a much greater extent because his power is a direct function of the shares he owns.

It is at this point that the similarities begin to diminish when one realizes that the vast majority of municipal governments do not focus on profit making and for the most part a municipality strives only to balance the budget. Profits are not paramount so that expansion is possible and so that dividends can be paid.

The most important criterion, that of deterrence is present in a municipal situation but other factors overshadow this consideration.<sup>30</sup> The ultimate question, then, remains: Does the Second Circuit's preoccupation with the private corporation model deter the reasoning process from the most important aspects? The answer to this inquiry appears to be yes.

It is important to realize that a municipality is a hybrid entity, partly corporate and partly an agency of the state.<sup>31</sup> As an agent of the state a municipality, through its police officers, has the power of arrest and the authority to search and seize with a valid warrant or upon probable cause. These considerations are constitutional and are therefore crucial. This constitutional dimension necessarily places municipal corporation liability in a different perspective.

A police officer, being an agent of the city, has the responsibility for enforcing its ordinances and protecting its citizens. When a police officer violates his obligation to the community he is personally subject to numerous sanctions.

- (1) He is presently subject to suit, and awards for both compensatory and punitive damages can be assessed against him.<sup>32</sup>

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*Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966); this rule is also followed by the federal courts, see *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893). See also RESTATEMENT OF TORTS § 909 (1939).

28. In several cases courts have held that continued employment of the tortfeasor is ratification per se. *Ricketts v. Chesapeake & O. Ry.*, 33 W. Va. 433, 10 S.E. 801 (1890).

29. A taxpayer is affected in that awards come directly from tax dollars; a shareholder by diminished dividends. See note 23 *supra*.

30. Note, *Exemplary Damages In The Law of Torts*, 70 HARV. L. REV. 517 (1957).

31. 18 E. McQUILLIAN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 53.23 (3d ed. 1963).

32. *Deaderick v. Smith*, 33 Tenn. App. 151, 230 S.W.2d 406 (1950); *Fernelius v. Pierce*,

- (2) He will be subject to the internal disciplinary procedures of the police department with the possibility of loss in time by suspension or loss of employment.<sup>33</sup>
- (3) Courts will exclude from evidence the fruits of his illegal activity.<sup>34</sup>
- (4) In some instances he will be subject to arrest and possible conviction.<sup>35</sup>

The above sanctions are directed exclusively against the police officer. It seems reasonable that if tort and criminal law are willing to single out an offending officer for constitutional infringements it is justifiable to extend both compensatory liability and punitive liability against the corporate municipality. The rationale is that where important considerations such as constitutional rights are involved the city has an additional burden to supervise, control and exercise extreme care in its hiring procedure.

A city should be punitively liable if it retains police officers who have shown a propensity toward violence and have previously violated fundamental civil rights. By placing the initiative for enforcement in the hands of the injured party and giving him the possibility of a substantial award the municipality is forced to create controls against police violations of individual rights. As a consequence, potentially dangerous personalities will be screened from placement in areas of critical exposure and persons like Samuel Tito Williams need no longer fear persecution by overzealous or even brutal police officials.

*Thomas P. Whelley II*

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22 Cal. 2d 226, 138 P.2d 12 (1943); *Noack v. Zellerbach*, 11 Cal. App. 2d 186, 53 P.2d 986 (1936).

A denial of due process is a violation of civil rights and civil liability attaches. *Geach v. Moynahan*, 207 F.2d 714 (7th Cir. 1953).

The Second Circuit indicated in *Williams*, 508 F.2d at 360, that a suit for punitive damages against the police officers would have been affirmed.

33. The police are under tremendous pressure to get results and since much of the illegality occurs in the normal scope of police activity it is unlikely that internal discipline will act as a deterrent. *Mason v. Wrightson*, 205 Md. 481, 109 A.2d 128 (Ct. App. 1954). See generally, Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

34. See generally, Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CAL. L. REV. 565 (1955); see also MD. ANN. CODE GEN. LAW art. 35, § 5 (1957).

35. In most states, for example, false imprisonment is a crime, but it is rarely enforced against police officers. *But see*, *Roberts v. Commonwealth*, 284 Ky. 365, 144 S.W.2d 811 (1940); *Montgomery v. State*, 145 Tex. Crim. Rep. 606, 170 S.W.2d 750 (1943).



