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Torts - Municipal Immunity

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estoppel doctrine presents some difficulty, as the underlying theory of estoppel is that a man is estopped from denying his prior position to the detriment of another.²² In this case it would mean that X was estopped from denying that his compensation insurance covered defendant's employees. This, of course, would not bind the insurer, and since X never represented that he was subjecting himself to personal liability, so that he could be estopped from so denying, X would seem not to be liable under estoppel. However, had defendant argued misrepresentation, it would seem that a cause of action had been stated. Therefore, it is submitted that misrepresentation would have been a more satisfactory basis for the instant decision, in view of the fact that "estoppels are not favored in law"²³ and are supposed to be used only when there is no other means of affording justice.²⁴

Ray Carlton Muirhead

TORTS — MUNICIPAL IMMUNITY

The widow of deceased sued defendant municipality for the wrongful death of her helplessly intoxicated husband who suffocated from smoke after being locked in jail and left alone. The trial court denied recovery by applying the doctrine of municipal tort immunity. On appeal to the Florida Supreme Court, *held*, reversed. A municipality has no immunity from liability in a tort action when a person suffers a direct personal injury proximately caused by the negligence of a municipal employee who is acting within the scope of his employment. However, the immunity still exists in legislative and judicial functions.¹ *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

The general rule is that municipalities are immune from

22. " 'Estoppel' cometh of the French word *estoupe*, from whence the English word *stopped*; and it is called an estoppel, or conclusion, because a man's own act or acceptance, stoppeth or closeth up his mouth to allege or plead the truth." COKE'S INSTITUTES 352a. See *Reynolds v. St. John's Grand Lodge, A.F. & A.M.*, 171 La. 395, 131 So. 186 (1930); *Lewis v. King*, 157 La. 718, 103 So. 19 (1925); *Paterno v. Villio*, 9 Orl. App. 104 (1912); *Lichtentag v. Feitel*, 1 Orl. App. 172 (La. App. 1904); PROSSER, LAW OF TORTS 529-30 (2d ed. 1955).

23. *Arkansas Louisiana Gas Co. v. Thompson*, 222 La. 868, 64 So.2d 202 (1952); *Carpenter v. Madden*, 90 So.2d 508, 514 (La. App. 1956).

24. Estoppel is an equitable remedy. *Glover v. Southern Cities Distributing Co.*, 142 So. 289 (La. App. 1932). Therefore estoppel must bow to the equitable rule that a complete and adequate legal remedy excludes equitable remedies. *Lacassagne v. Chapuis*, 144 U.S. 119 (1892).

1. The judiciary and the legislature have always been accorded immunity from tort liability because of the desire to preserve their independence. See PROSSER, LAW OF TORTS 780, § 109 (2d ed. 1955).

liability for torts resulting from the exercise of governmental functions,² but are liable for torts arising out of proprietary functions.³ This rule of liability or immunity based on the activity involved was first introduced into the American common law in 1842 by the New York court in the case of *Bailey v. New York*.⁴ The immunity apparently grew out of the English premise that the sovereign can do no wrong, but since its inception the courts have advanced other reasons to justify the immunity.⁵ The policy of allowing or denying municipal liability on the basis of the function involved has produced inconsistent⁶ and in many cases unjust⁷ results. The courts have restricted the im-

2. *McSheridan v. Talladega*, 243 Ala. 162, 8 So.2d 831 (1942); *Kelly v. Chicago*, 324 Ill. App. 382, 58 N.E.2d 278 (1944); *Tzatken v. Detroit*, 226 Mich. 603, 198 N.W. 214 (1924); *Gullikson v. McDonald*, 62 Minn. 278, 64 N.W. 812 (1895).

3. *Pignet v. Santa Monica*, 29 Cal. App.2d 286, 84 P.2d 166 (1938); *Karsey v. San Francisco*, 130 Cal. App. 655, 20 P.2d 751 (1933); *Peavey v. Miami*, 146 Fla. 629, 1 So.2d 614 (1941); *Bathke v. Traverse City*, 308 Mich. 1, 13 N.W.2d 184 (1944); *Brantman v. Canby*, 119 Minn. 396, 138 N.W. 671 (1912); *Burton v. Salt Lake City*, 69 Utah 186, 253 Pac. 443 (1926); *Richmond v. James*, 170 Va. 553, 197 S.E. 416 (1938).

4. 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

5. See PROSSER, *LAW OF TORTS* 774, § 109 (2d ed. 1955). These reasons are that the municipality derives no profit from the exercise of governmental functions, that in the performance of such duties public officers are agents of the state and not of the corporation, that cities cannot carry on their governmental activities if money is to be diverted to making good the torts of employees, and that it is unreasonable to hold the municipality liable for negligence in the performance of duties imposed upon it by the Legislature. See also Doddridge, *Distinction Between Governmental and Proprietary Functions of the Government*, 23 MICH. L. REV. 325, 337 (1925), where it is stated that in addition to the technical idea that the sovereign is immune from tort liability the following reasons also have been advanced — that it is better for the individual to suffer than for the public as a whole to suffer and that such liability would retard agents of the municipality in the performance of their duties. It should be noted that these authorities are merely listing reasons advanced by the courts, not expressing approval of those reasons.

6. See Doddridge, *Distinction Between Governmental and Proprietary Functions of the Government*, 23 MICH. L. REV. 325 (1925). See also a collection of cases in Note, 16 LOUISIANA LAW REVIEW 812, 814, n. 6 (1956) with exactly the opposite holding as to whether a particular activity is governmental or proprietary. The South Carolina courts, noting the confusion produced by the governmental and proprietary distinction, apply the immunity in all cases regardless of the function involved, except where the Legislature has expressly imposed liability. *Irvine v. Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

7. The respondeat superior doctrine is based on the public policy of allowing recovery from the master who is more likely to have the means with which to satisfy a judgment than the servant would have. See MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 352 (4th ed. 1952): “[S]ince the principal or master is likely to be of greater financial responsibility than the agent or servant . . . and since public policy demands that injuries shall not go uncompensated, the best results are promoted by giving a remedy against the principal.” It is difficult to reconcile the municipal immunity with this concept of liability of the master. It is equally difficult to see how justice is achieved when recovery is allowed for an injury sustained by the negligent operation of a city-owned streetcar, *Young v. New Orleans*, 14 La. App. 306 (1930), and denied when the injury results from the negligent operation of a fire truck, *Brock-Hall Dairy Co. v. New Haven*, 122 Conn. 321, 189 Atl. 182 (1937). At least from the point of view of the injured party, it

munity by devising exceptions rather than by discarding it entirely. Liability may be imposed under one such exception when the municipality is found to have maintained a nuisance.⁸ Further, some jurisdictions regard the purchase of liability insurance as a waiver of immunity,⁹ although one court has held that the purchase of liability insurance does not produce a waiver where governmental functions are involved.¹⁰ Several states have attempted to remove the immunity in certain areas of municipal activity by statute, but these efforts have met with limited success primarily because the courts of those states have insisted on construing the statutes strictly as being in derogation of the common law.¹¹

Louisiana subscribes to the general rule of immunity for governmental functions¹² and liability for proprietary functions.¹³ In Louisiana the immunity is personal to the municipality.¹⁴ Therefore, if the municipality has purchased liability insurance, the injured party may proceed directly against the insurer who

would seem that it matters little whether the vehicle involved was a streetcar or a fire truck.

8. *Hoffman v. Bristol*, 113 Conn. 386, 155 Atl. 499 (1931); *Valparaiso v. Moffit*, 12 Ind. App. 250, 39 N.E. 909 (1895); *Hines v. Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913); *Fort Worth v. Wiggins*, 5 S.W.2d 761 (Tex. 1928).

9. *Tracy v. Davis*, 123 F. Supp. 160 (E.D. Ill. 1954); *Bailey v. Knoxville*, 113 F. Supp. 3 (E.D. Tenn. 1953); *Thomas v. School Dist.*, 348 Ill. App. 567, 109 N.E.2d 636 (1952).

10. *Stephenson v. Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950).

11. See Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 351 (1957) for a review of statutory changes in the United States and the subsequent application of them by the courts. "Courts are not only reluctant to remedy the situation themselves, they have also overwhelmingly refused to recognize legislative rectification in any but the most obvious and unavoidable situations." *Id.* at 354.

12. See Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720 (1941), for an analysis of the use of the immunity doctrine in Louisiana and a criticism of the rule. The distinction between governmental and proprietary functions was first used in *Stewart v. New Orleans*, 9 La. Ann. 461 (1854), but it did not receive the approval of a majority of the court (2 judges approving the distinction, 1 concurring for other reasons, 2 dissenting). It was adopted by a majority in *Lewis v. New Orleans*, 12 La. Ann. 190 (1857) and has since been regarded as the rule in Louisiana. Cases illustrative of governmental functions: *Barber Laboratories v. New Orleans*, 227 La. 104, 78 So.2d 525 (1955), criticized by *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Local Government*, 16 LOUISIANA LAW REVIEW 303, 316 (1956) (negligence by members of fire department while fighting fire); *Howard v. New Orleans*, 159 La. 443, 105 So. 443 (1925) (negligent operation of elevator in municipal building); *Roach v. Shreveport*, 8 La. App. 339 (1928) (police officers wrongfully disposing of automobile removed from street).

13. *Oliphant v. Lake Providence*, 193 La. 675, 192 So. 95 (1939); *Young v. New Orleans*, 14 La. App. 306, 129 So. 247 (1930); *Phillips v. Alexandria*, 11 La. App. 228, 123 So. 510 (1929); *Mask v. Monroe*, 9 La. App. 431, 121 So. 250 (1928); *Hart v. Lake Providence*, 5 La. App. 294 (1927); *Bannister v. Monroe*, 4 La. App. 182 (1926).

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

cannot interpose the immunity.¹⁵ In *Burris v. New Orleans*¹⁶ it appeared that the Louisiana court was going to restrict the immunity further by broadening the nuisance exception to permit liability where the municipality was found to have maintained an attractive nuisance. However, on the second appeal of the case the court reversed its position and applied the immunity, although not conclusively rejecting the contention that under some circumstances an attractive nuisance might be an exception to the immunity rule.¹⁷ Legal scholars have been critical of the rule based on the governmental-proprietary doctrine in that it is basically unreal and judicially unworkable.¹⁸ No test advanced thus far has been consistently workable in determining whether a function is governmental or proprietary.¹⁹ Some courts have been cognizant of the need for a change, but contend that the immunity is embodied in the common law and that any change must originate with the legislature.²⁰ Most legal writers are agreed that, since the courts have refused to act, it is indeed necessary for the legislatures to make the change.²¹

15. LA. R.S. 22:655 (1950).

16. *Burris v. New Orleans*, 86 So.2d 549, 555 (La. App. 1956), 17 LOUISIANA LAW REVIEW 498 (1957): "[W]e conclude that possibly there may be circumstances under which the doctrine [attractive nuisance] should be applied even where a municipality is engaged in the performance of a governmental function." The case was remanded to the trial court for a determination of whether such circumstances existed.

17. *Burris v. New Orleans*, 100 So.2d 550, 551 (La. App. 1958): "The only question now posed is one of law . . . that is whether under the facts of this case the doctrine of attractive nuisance constitutes an exception to the general rule that a municipality while engaged in a governmental function is immune from tort liability." The court went on to conclude that the doctrine did not constitute an exception "under the facts of this case." *Id.* at 552.

18. See Antieau, *The Tort Liability of American Municipalities*, 40 KY. L.J. 131 (1952); Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 129 (1924); 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).

19. See Comment, 1 BROOKLYN L. REV. 85, 88 (1932), and cases cited therein. These tests of governmental function are set forth: (1) when it performs a duty imposed by the Legislature of the state, (2) only when such imposed duty is one the state may perform and which pertains to the administration of the government, (3) when the municipality acts for the public benefit generally as distinguished from acting for its immediate benefit and its private good, (4) when the act performed is legislative or discretionary as distinguished from ministerial.

20. *Singleton v. Sumter*, 180 S.C. 536, 542, 186 S.E. 535, 537 (1936): "We deem it not improper to call to the attention of the legislature the need of additional legislation if it desires to protect individuals in their person and property against employees of municipalities negligently operating dangerous instrumentalities." See also *Orgeron v. Louisiana Power and Light Co.*, 19 La. App. 628, 140 So. 282 (1932); *Reeves v. City of Easley*, 167 S.C. 231, 166 S.E. 120 (1932); *Moore v. Milwaukee*, 267 Wis. 166, 65 N.W.2d 3 (1954). And yet, where the Legislature has acted, the courts have limited the resulting liability by strict interpretation of the statutes. See note 11 *supra*.

21. Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 129 (1957); Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 129 (1924); Fordham & Pegues, *Local Government Responsibility in Tort in Louisi-*

However, one critic of the immunity and the Florida court in the instant case have declared that it is the responsibility of the courts to make the correction.²²

Prior to the instant case, the Florida courts had judicially restricted the immunity further than most jurisdictions by evidencing a tendency to find municipal activities to be proprietary rather than governmental.²³ Nevertheless, the immunity was consistently applied in the case of torts of police officers.²⁴ In deciding the instant case the court squarely faced the arguments historically advanced to justify the immunity and rejected them.²⁵ Florida is now in the unique position of having judicially eliminated the immunity based on the governmental-proprietary doctrine. In so doing, the court specifically stated that the immunity still exists in situations involving legislative and judicial functions.²⁶ In rejecting the immunity doctrine the court reasoned that they were not disregarding the doctrine of stare decisis but were merely returning to earlier and wiser jurisprudence which denied immunity.²⁷ Since the early Louisiana cases allowed no immunity,²⁸ it is suggested that the Louisiana courts could also reason that to reject the immunity is merely a return to earlier jurisprudence. However, only two years before the instant case the Louisiana Supreme Court was specifically asked

ana, 3 LOUISIANA LAW REVIEW 720 (1941); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949); Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932).

22. Green, *Freedom of Litigation (III), Municipal Liability for Torts*, 38 ILL. L. REV. 355, 382 (1944): "All that is required to get rid of the immunities now protecting municipalities from their just responsibilities is a moderate amount of common law statesmanship on the bench. . . . It is not the legislature's problem." The court in the instant case, 96 So.2d at 132, said: "We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."

23. Wolfe v. Miami, 103 Fla. 774, 134 So. 539 (1931); Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150 (1924).

24. Miami v. Bethel, 65 So.2d 34 (Fla. 1953); Brownlee v. Orlando, 157 Fla. 524, 26 So.2d 504 (1946); Kennedy v. Daytona Beach, 132 Fla. 675, 182 So. 228 (1938).

25. The court adopted the view of the dissents in Miami v. Bethel, 65 So.2d 24 (Fla. 1953) and William v. Green Cove Springs, 65 So.2d 56 (Fla. 1953) as a thorough and lucid explanation of their justification for the departure from the immunity rule.

26. The court cited Elrod v. Daytona Beach, 132 Fla. 24, 180 So. 378 (1938) (unconstitutional, discriminatory ordinance, immunity applies) and Akin v. Miami, 65 So.2d 54 (Fla. 1953) (city official withholding building permit, apparently without justification, immunity applied) as illustrative of legislative, quasi-legislative, judicial, and quasi-judicial functions.

27. Tallahassee v. Fortune, 3 Fla. 19, 62 Am. Dec. 358 (1850).

28. Johnson v. Municipality No. One, 5 La. Ann. 100 (1850): "The liability of municipal corporations for the acts of their agents is a general rule of law too well settled to be seriously questioned." See also M'Gary v. Lafayette, 12 Rob. 668 (La. 1846); Lambeth v. Mayor, 6 La. 731 (1834); Mayor v. Peyroux, 6 Mart.(N.S.) 155 (La. 1827).

to reverse its present position of applying the immunity in governmental functions and refused to do so.²⁹

Since the courts originally announced the immunity based on the governmental-proprietary distinction, there is no reason why they should not act to eliminate it. On the other hand, if the immunity were to be judicially eliminated, the municipalities would be immediately exposed to extensive liability. This fact gives rise to the argument that the legislatures should follow the lead of the federal government by enacting laws similar to the Federal Tort Claims Act and thus impose general liability³⁰ while preserving the immunity in certain functions.³¹ This possibility lends some force to the argument that the legislatures should take the responsibility of imposing tort liability on the municipalities. However, it is submitted that there is no longer any need to provide municipalities any protection from tort liability, and that the correction should be made by the courts who are responsible for the rule.

J. C. Parkerson

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

30. Federal Tort Claims Act, 28 U.S.C. § 2674 (1952).

31. *Id.* § 2680.