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## Doctrine of Sovereign Immunity - Statute - Municipal Tort Liability

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# DOCTRINE OF SOVEREIGN IMMUNITY—STATUTE —MUNICIPAL TORT LIABILITY

The doctrine of sovereign immunity, which originated in feudal England,<sup>1</sup> has long been the subject of criticism.<sup>2</sup> But, in varying degrees, it persists in most jurisdictions.<sup>3</sup> Originally, it was applied in actions against the state only, but the immunity privilege was gradually extended to cover municipalities and other lesser governmental bodies.<sup>4</sup> In recent years, a number of states have lim-

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1. This was one of the incidents of the "divine rights of kings," based on the sovereign's identification with the State and supported by the platitude that "the King can do no wrong."

2. As early as *Langford v. United States*, 101 U.S. 341, 343 (1879), Mr. Justice Miller vigorously denied the propriety or applicability of the doctrine in a country where the republican form of government prevails. Even before that time, in 1849, the dissenting judge in *City of St. Louis v. Gurno*, 12 Mo. 414, 426, commented on the doctrine as follows:

No sufficient reason occur[s] why a citizen who may sue his neighbor, should be restrained from similarly suing 6,000 or 7,000 (incorporated) for an injury.

For articles generally disfavoring the theory see Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 *Law & Contemp. Prob.* 214 (1942); Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 *Va. L. Rev.* 910 (1936); Tooke, *The Extension of Municipal Liability in Tort*, 19 *Va. L. Rev.* 97 (1932); Doddridge, *The Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 *Mich. L. Rev.* 325 (1925). Perhaps the most thorough and well-known treatment of the doctrine is to be found in six related articles: Borchard, *Government Liability in Tort*, 34 *Yale L.J.* 1, 129, 229 (1924), and *Governmental Responsibility in Tort*, 36 *Yale L.J.* 1, 757, 1039 (1926-27).

3. "In the absence of statute, it has always been the law that no private action for tort will lie against the state, since negligence cannot be imputed to the sovereign." 18 *McQuillan, Municipal Corporations* § 53.24 (3d ed. 1950, Supp. 1958).

4. *Russell v. Men of Devon*, Willes 74, 100 Eng. Rep. 359 (K.B. 1788) is generally conceded to be the first case in which the doctrine of sovereign immunity was extended to include immunity of municipalities. In that case the action was brought against the entire populace of the county of Devon, and the ruling in favor of the community reflected the fact that there were no corporate funds with which to satisfy a judgment. In modern times it has not been so much the lack of funds which supported the immunity decisions as it has been the reluctance of courts to designate any part of public funds as judgment moneys. It is interesting to note, however, that in England, where the theory was created, it has been rejected for almost a century. *Coe v. Wise* [1866] 1 Q.B. 711.

The rule of immunity, as applied to municipalities and other non-sovereign bodies, has not been absolute. Typical language of the cases states that "a city is not liable for torts committed in the exercise of governmental functions, but is liable while exercising corporate functions." *Barker v. City of Santa Fe*, 47 N.M. 85, 87-88, 136 P.2d 480, 482 (1943). E.g. *Imperial Production Corp. v. City of Sweetwater*, 210 F.2d 917 (5th Cir. 1954); *Montgomery v. City of Athens*, 229 Ala. 149, 155 So. 551 (1934); *City of Phoenix v. Lane*, 76 Ariz. 240, 263 P.2d 302 (1953); *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917); *Schwab v. Connely*, 116 Colo. 195, 179 P.2d 667 (1947); *Delaware Liquor Store v. Mayor & Council of Wilmington*, 45 Del. 461, 75 A.2d 272 (1950); *Lisk v. City of West Palm Beach*, 160 Fla. 632, 36 So.2d 197 (1948); *Banks v. City of Albany*, 83 Ga. App. 640, 64 S.E.2d 93 (1951); *Mark v. City & Co. of Honolulu*, 40 Hawaii 338 (1953); *Hooton v. City of Burley*, 70 Idaho 369, 219 P.2d 651 (1950); *Gravander v.*

ited the effect of the doctrine as applied to non-sovereign governments either by statute<sup>5</sup> or by the court decision.<sup>6</sup> In cases that involve an insured defendant, recovery is most often allowed on the theory that the purchase of insurance constitutes a "waiver" of immunity.<sup>7</sup>

New Mexico has followed the general rule in tort suits against a municipality, allowing recovery only when the activity of the defendant was "proprietary" and not "governmental."<sup>8</sup>

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City of Chicago, 399 Ill. 381, 78 N.E.2d 304 (1948); Florey v. City of Burlington, 247 Iowa 316, 73 N.W.2d 770 (1955); Perry v. City of Wichita, 174 Kan. 264, 255 P.2d 667 (1953); Fawbush v. Louisville & Jefferson County, 240 S.W.2d 622 (Ky. App. 1951); Prunty v. City of Shreveport, 223 La. 475, 66 So.2d 3 (1953); Wilde v. Inhabitants of Town of Madison, 145 Me. 83, 72 A.2d 635 (1950); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944); Phinney v. City of Seattle, 34 Wash.2d 183, 208 P.2d 882 (1949); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952).

5. Typical of statutes which eliminate the immunity doctrine are: N.C. Gen. Stat. Ann. § 143-292 (1952); N.J. Stat. Ann. § 32:1-162 (Supp. 1961), effective reciprocally with N.Y. Unconsol. Laws §§ 6667, 6688-99 (1950); whereas still other states have enacted legislation providing that the insurer may not plead the immunity of the insured: Ga. Code Ann. §§ 32-429, 32-431 (Harrison 1952); Ind. Stat. Ann. § 39-1819 (Burns 1952); N.M. Stat. Ann. §§ 64-25-8, 64-25-9 (1953).

6. In Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), the court denied the application of the theory to any situation arising in a democratic form of government, and thereby refused to perpetuate what it considered to be an "anachoristic" doctrine. Cf. Thompson v. City of Jacksonville, 130 So.2d 105 (Fla. 1961). In *Molitor v. Kane-land Community Unit Dist. No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), the court, in reversing dismissal of suit brought by an injured school-bus rider, at 96, said: "We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society." The California court, in *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 359 P.2d 457, 460, 463 (1961), said: "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . [T]he doctrine of governmentat immunity for torts for which its agents are liable has no place in our law." A policeman wounded a minor in New Jersey, and when suit was brought upon the policeman's negligence, the court applied the theory of *respondeat superior* (ordinarily curtailed by the immunity doctrine), saying: "Surely it cannot be urged successfully that an outmoded, inequitable, and artificial curtailment of a general rule of action created by the judicial branch of the government cannot or should not be removed by its creator. . . . [J]udicial and not legislative action closed the courtroom doors, and the same hand can, and, in proper circumstances should, reopen them." *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820, 832 (1960).

7. *City of Kingsport v. Lane*, 35 Tenn. App. 183, 243 S.W.2d 289 (1951) (when city took out liability policy providing that insurer would not employ any defense based on insured being a municipality, city waived immunity to extent of coverage); *Thomas v. Broadlands Community Consol. School Dist.*, 348 Ill. App. 567, 109 N.E.2d 636 (1952) (only justifiable reason for immunity from tort is protection of public funds and public property; since public funds in school district were protected by insurance, immunity waived).

8. *Hammell v. City of Albuquerque*, 63 N.M. 374, 320 P.2d 384 (1958) (Installation of stop signs or electrical control systems is exercise of governmental discretion "for which a municipality cannot be called to account respecting its employment of such power"); *Primus v. City of Hot Springs*, 57 N.M. 190, 256 P.2d 1065 (1953), *Napoleon v. City of Santa Fe*, 38 N.M. 494, 35 P.2d 973 (1934), and *City of Roswell v. Davenport*, 14 N.M. 91, 89 Pac. 256 (1907) (in all three cases, failure to maintain streets in safe

In 1941, the New Mexico legislature enacted a statute that authorized the state Board of Finance to direct the purchase of insurance to cover the negligent operation of state motor vehicles.<sup>9</sup> The statute bars suit against the state

condition or to provide a barricade was held to be negligence to which no immunity attaches, since cities had "full and complete charge" of their streets and sidewalks, in proprietary capacities). In *Murphy v. City of Carlsbad*, 66 N.M. 376, 348 P.2d 492 (1960), the establishment and maintenance of public park was expressly determined to be a proprietary function, and for negligence connected therewith, the city was not immune from suit. See also *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943) (city liable for child drowning in sewage disposal tank where fences around the plant were not maintained in a safe condition, the duty to so maintain the fences being a corporate function); *Gilbert v. New Mexico Const. Co.*, 39 N.M. 216, 44 P.2d 489 (1935) (failure to render fire-fighting service is a governmental matter and city is not liable in suit for negligence); *Johnson v. City of Santa Fe*, 35 N.M. 77, 290 Pac. 793 (1930) (city acting in its proprietary capacity while engaged in street repair, and liable for injuries sustained by plaintiff falling into unbarricaded open sewer laterals). Whereas the term "proprietary" is not used in all cases, the court adverts to equally common phraseology and refers to the "corporate nature" of the municipalities (rather than to their "governmental" characteristics) when determining that immunity may not be invoked.

A factor which further complicates the area of immunity is the superficiality of the proprietary-governmental classification. In *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228, 230 (1911), in refusing to consider whether the action was corporate or governmental, the court pointed out: "That which to-day might clearly appear to be a private business of a corporation, authorized by law, in a short time might appear to be a plain public operation and a governmental function." The Supreme Court expressed its dissatisfaction with the classification in *City of Trenton v. New Jersey*, 262 U.S. 182, 191-92 (1923): "The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs in one or the other class. . . . [G]enerally it is applied to escape difficulties." (Quoted with approval by the court in *Gravander v. City of Chicago*, 399 Ill. 381, 78 N.E.2d 304, 306 (1948), *Johnston v. City of East Moline*, 338 Ill. App. 220, 87 N.E.2d 22, 25 (1949)). In *Kaufman v. City of Tallahassee*, 84 Fla. 634, 94 So. 697 (1922), it was said that if the city is operating under the commission plan, all of its activities are of a corporate nature.

9. Section 2 of ch. 192, Session Laws of 1941 (now N.M. Stat. Ann. §§ 64-25-8 and -9 (1953)): "An Act Authorizing the State Board of Finance to Direct the Purchase of Public Liability and Property Damage Insurance Upon All Cars Owned and Operated by the State of New Mexico.

Section 1. The State Board or Finance is authorized to require all officials or the administrative head of all departments to purchase and secure public liability and property damage insurance in such sums as they may deem advisable, protecting the state against injury to property or persons because of the negligent operation of automobiles, trucks, trailers, tractors, graders or other motor vehicles, by employees, agents, or officials of the state, or any of its institutions, agencies, or political subdivisions. [N.M. Stat. Ann. § 64-25-8 (1953)].

Section 2. No action shall be brought or entertained in any court of this state against the state or any of its institutions, agencies or political subdivisions for injury or damage caused by the operation of such vehicles, but the action for any such injury or damage shall be brought against the person operating such vehicle at the time of the injury or damage. Every policy of insurance upon such vehicles shall contain a provision that the defense of immunity from tort liability because the insured is a governmental agency or an employee of a governmental agency, or because the accident arose out of the performance of a governmental function, shall not be raised against any claim covered by such policy, provided the claimant, or the plaintiff in the event suit is instituted, shall file with the insured a release in writing of any amount of such claim in excess of the

or its political subdivisions, and provides that the action shall be brought against the operator of the vehicle. The language of the statute would appear to permit an injured plaintiff to sue the vehicle's negligent driver and recover *whether or not* the function was "governmental" or "proprietary." It is not clear, however, whether complete municipal immunity is conditioned upon the existence of insurance or, on the other hand, whether the antecedent law would control in cases where the municipality had not in fact purchased insurance. In *City of Albuquerque v. Campbell*<sup>10</sup> a city dump truck was damaged in a collision with defendant's automobile and the city sued for the damages to the truck. Defendant counterclaimed for damages to her automobile on the theory that the city driver had the "last clear chance" to avoid the accident. The city pleaded that the statute in question covered municipalities and that it prohibited suit against the city—in short, that it provided a complete defense—and moved for dismissal of the counterclaim. The trial court granted plaintiff's motion; the Supreme Court affirmed.

The opinion of the Supreme Court may be construed as holding that the statute bars a tort suit against a municipality whether or not it has purchased insurance. The existence of insurance, in this case, was never introduced by the pleadings, at trial, or in oral argument on appeal.<sup>11</sup> Nevertheless, it is sig-

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limit stated in the policy, and a further statement that any such release shall not be construed as an admission of liability, nor may it be offered in evidence for any purpose, and that no attempt be made in the trial of any case to suggest the existence of any insurance which covers in whole or in part any judgment or award in favor of the claimant. [N.M. Stat. Ann. § 64-25-9 (1953)]." (Defendant protested that the statute was unconstitutional because the title did not clearly indicate that the contents of the statute applied to municipalities. The argument was rejected on the theory that the "heading" of the statute, having been inserted by the editors of the compilation, was not a part of the law itself.)

The language of the statute leaves room to inquire whether an injured plaintiff might have a mandamus action against the State Board of Finance had the Board failed to issue a directive to the city to purchase insurance if, in fact, the city was uninsured. Sutherland, in his work (3 Statutory Construction 86, § 5808, 1943), indicates that "where statutes provide for the doing of acts or the exercise of power or authority by public officers, and private rights or public interest require the doing of such acts . . . they are mandatory, regardless of whether they are phrased in imperative or permissive terms." Mandamus would be the proper action, no doubt, since the plaintiff seemingly would fare no better in an action of negligence against the State Board for failure to direct purchase, because the Board itself would have the protection of the sovereign immunity doctrine.

10. 68 N.M. 75, 358 P.2d 698 (1961).

11. Letters on file at the offices of the Natural Resources Journal from counsel representing plaintiff and defendant verify that no mention was made at any stage of the trial concerning the existence of insurance, nor was it raised or argued upon appeal.

The record discloses that the municipality was not represented in the Supreme Court by the official city attorneys, but by a private law firm located in Santa Fe. Among attorneys and courts in New Mexico that firm's past representation of insurance companies may be fairly well-known, and it is possible that its connection with the lawsuit was surmised by the court when it, rather than one of the city's own attorneys, appeared for the City of Albuquerque. But Nichols, in his treatise, states unequivocally that the

nificant that the City of Albuquerque was, in the instant case, insured. One reasonable construction of the statute is that it is intended to provide a defendant for suit, and insure a recovery if negligence is proved, thus bypassing the technicalities inherent in the usual litigation involving states and municipalities.<sup>12</sup> If the court's decision in *Campbell* were construed to mean that *all* suits against governmental agencies based on negligent operation of their motor vehicles are barred by the statute, whether or not there is insurance, it would contradict the statute's basic purpose. If a municipality failed to procure insurance, it would be able to evade liability in many instances in which it would have been liable under the prior "governmental-proprietary" distinction.<sup>13</sup> Plaintiff would thereby be deprived of any recourse (a result obviously not anticipated by the draftsmen).

A better construction requires the plaintiff to bring suit against a negligent

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"individual knowledge of a judge as to a fact not generally or professionally known cannot be the basis of judicial notice." 3 Nichols, Applied Evidence § 15, at 2744 (1928). It is generally conceded that the test for what shall be judicially noticed is limited to facts which are of "common everyday knowledge in that jurisdiction, which *everyone* of average intelligence and knowledge of things about him can be presumed to know," in addition to its being certain and indisputable. See 3 Nichols, Applied Evidence § 10 at 2743 (1928) (emphasis added); *Varcoe v. Lee*, 180 Cal. 338, 181 Pac. 223 (1919). The knowledge that a certain law firm has previously represented insurance companies would not appear to readily fall within the category of "facts" which can be judicially noticed so as to rationalize the finding of the court in this particular case.

There is little doubt that municipalities customarily carry motor vehicle coverage, but plaintiffs' lawyers suing city vehicle drivers for negligent injuries would surely be unduly remiss, it would seem, were they to rely on this decision as precedent for recovery, without attempting to prove that the city vehicle was, in fact, insured.

12. Later legislation would confirm this assumption, especially in those situations involving insurance. See N.M. Stat. Ann. §§ 5-6-18 through 5-6-22 (Supp. 1961) which provide that recovery may be had for death, personal injury or property damage resulting from negligence of employer or employee occurring during any employment for the state, county, city, school district, state institutions, etc., but that "no judgment shall run against the state, county, city . . . public agency or public corporation . . . unless there be liability insurance to cover the amount and cost of such judgment." The same act provides specifically that suits may be maintained against any such enumerated public entity.

The Attorney General of the state has construed this statute as barring the defense of immunity by the municipality "even when it is carrying out a governmental function." [1959-1960] Report of the Attorney General of New Mexico Op. No. 59-75.

13. The question thus becomes: "If the statute provides a defendant against whom suit may be brought and recovery allowed—such recovery being limited to the proceeds of insurance purchased by an entity against which suit may *not* be brought—can the city's immunity be made completely invulnerable, merely by failing, refusing, or neglecting to purchase the insurance, and then relying on both the immunity doctrine *and* the statute?" An associate City of Albuquerque Attorney informed the writer that all municipalities undoubtedly would feel a moral obligation to purchase insurance if this construction of the decision were tenable. But the mere fact that this case could be interpreted as giving the municipality a complete defense provokes the comment that it is indeed a curious twist that a municipal corporation would voluntarily insure in order to minimize the effects of an adverse judgment for tort liability, and then rely upon a statute (which had no bearing in the procurement of that insurance) to deny the action that the insurance was intended to meet.

operator *only* where it is shown that the municipality has insured its vehicles. In those situations where there is no insurance, plaintiff should be permitted to sue the municipality under the same conditions that prevailed under the earlier law. It may well be that this is the meaning of the court's language that the statute, although "not intended to open the doors to suits" against government agencies, denies suit only if "they are not otherwise subject thereto."<sup>14</sup> To read the statute in this manner accords with what appears to have been the legislative intent. Unfortunately, *Campbell* leaves the issue open. It is recommended that the rule to be clarified in future decisions to require a showing of the existence of insurance, prior to allowing the statute to be pleaded as a defense.

Under the construction herein urged, potential plaintiffs are relieved of having to prove the "proprietary" nature of defendant's activity. Accomplishing only this, the statute constitutes a salutary restriction of the outmoded doctrine of sovereign immunity. But this indirect form of providing relief, because of its statutory qualifications, is of dubious value. A suit now pending<sup>15</sup> is illustrative: the driver of the city vehicle having died, plaintiff was obliged under the statute to sue his estate. Since the jury will not know that the driver's widow is only the nominal defendant, it undoubtedly will look at a suit brought against a modestly-circumstanced, elderly widow with less sympathy than it would toward one against a municipal defendant.<sup>16</sup> By requiring that the driver be sued rather than the municipality, the legislature, having overcome one objectionable impediment to redress, may merely have replaced it with another. The confusions to which such a statute might lead indicate the weakness of half-way measures. If future enactments dealing with controversial concepts, such as sovereign immunity, are written in forthright language which clearly expresses the considerations of the legislature and the purpose the legislation is intended to serve, they might well prevent conflicting results and ambiguous opinions.

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14. 68 N.M. 75, 80, 358 P.2d 698, 702 (1961).

15. For obvious reasons, the case is not identified.

16. And in New Mexico, the matter of an insured defendant will never be brought to the attention of the jury if plaintiff wishes to avoid the risk of mis-trial.