North Dakota Law Review

Volume 39 | Number 3 Article 9

1963

# Municipal Corporations - Actions - Effect of Liability Insurance on Government Immunity

Gordon R. Nesvig

to his cause leaves his guilt undetermined, and serves to defeat the public's interest in the conviction of criminals.

GORDON W. SCHNELL

MUNICIPAL CORPORATIONS — ACTIONS — EFFECT OF LIABILITY INSURANCE ON GOVERNMENT IMMUNITY—City defendant, as a government function, owned and maintained a tobaggan slide for the use of the public. There was no admission charged. The plaintiff sues to recover damages for injuries sustained when her toboggan struck a patch of frozen hummocks at the bottom of the hill. The Supreme Court of Wisconsin in reversing the trial court decision *held*, two Justices dissenting, that since the city had taken out liability insurance and the insurer had agreed not to raise the defense of governmental immunity while defending in the city's name; the city had thereby waived its immunity and plaintiff could recover. The dissent argued that the procurement of insurance in and of itself, should not create liability where none theretofore existed. *Marshall v. City of Green Bay*, 118 N.W.2d 715 (Wis. 1963).

The general rule is that the carrying of liability insurance has no effect on existing immunity in the performance of governmental functions.[1] Such immunity has been deemed fundamental and jurisdictional when running to subdivisions of the state.[2] The majority of jurisdictions hold that in the absence of a statute expressly granting such power, a governmental unit cannot make an agreement which will waive immunity from tort liability.[3] This would be considered a usurpation of legislative powers.[4] It has not been the intent of legislatures, in authorizing the procurement of insurance

1. Hummer v. School City of Hartford County, 124 Ind. App. 30, 112 N.E.2d 891 (1953); Stucker v. County of Muscatine, 249 Ia. 485, 87 N.W.2d 452 (1958); Maffei v. Inc. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

2. Mann v. County Bd. of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957).

3. Stephenson v. City of Raleigh, 232 N.C. 42, 59 S.E.2d 195 (1950); Boice v. Board of Ed. of Rock Dist., 111 W.Va. 95, 160 S.E. 566 (1931); Price v. State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946). The court in the principal case expressly overruled Pohland v. City of Sheboygan, 251 Wis. 10, 27 N.W.2d 736 (1947) which was in accord with the above authority.

4. Livingston v. New Mexico College of A. & M. Arts, 64 N.M. 306, 328 P.2d 78 (1958).

by municipalities to enlarge liability, but merely to allow the protection of insurance against existing liabilities or liabilities which may be incurred.[5] Wisconsin, while permitting a municipality to procure liability insurance, does not by statute allow such policy coverage to include an agreement expressly waiving governmental immunity.[6]

There are decisions in a few states, including Illinois,[7] Michigan,[8] Minnesota,[9] Oregon,[10] and Tennesseee,[11] holding that governmental immunity is waived to the extent of insurance coverage. A few of these courts argue that since insurance is carried it would be a waste of public funds to pay policy premiums and then claim sovereign immunity.[12] Others claim that with insurance in effect the problem of taking public funds to pay damage claims is rendered moot.[13]

A municipality, even with the usual immunity remaining, can show good cause for insurance coverage. In carrying out governmental functions, such bodies can be found liable on a variety of grounds: that they have been negligent in the exercise of a governmental function;[14] that they were guilty of a negligent omission;[15] that some device used in carrying on a governmental function was inherently dangerous;[16] that they have violated the "safe place" statutes;[17] or that the function was actually proprietary.[18]

---

5. McGrath Building Co. v. City of Bettendorf, 248 Ia. 1356, 85 N.W.2d 616 (1957); Texas Prison Bd. v. Cabeen, 159 S.W.2d 523 (Tex. 1942).

6. 10 W.S.A. 66.18 (1957).

7. Lynwood v. Decatur Park Dist., 26 Ill. App. 2d 431, 168 N.E.2d 185 (1960).

8. Christie v. Bd. of Regents of Univ. of Mich., 364 Mich. 202, 111 N.W.2d 30 (1961).

9. Schoening v. United States Aviation Underwriters Inc., 120 N.W.2d 859 (Minn. 1963).

10. Vendrell v. School Dist. No. 26C Malheur County, 226 Ore 263, 360 P.2d 282 (1961). Here the decision applied only to school Dists.

11. Bailey v. City of Knoxville, 113 F. Supp. 3 (E.D. Tenn. 1963).

12. McCloud v. City of LaFollette, 38 Tenn. App. 553, 276 S.W.2d 763 (1954); **supra,** notes 8, 9, 11.

13. Thomas v. Broadlands Community Consol. School Dist. 348 Ill. App. 567, 109 N.E.2d 636 (1952); **Supra,** note 7.

14. Matlock v. New Hyde Park Fire Dist., 16 A.D.2d 831, 228 N.Y.S.2d 894 (1962).

15. Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

16. Hissem v. Bell Telephone Co. of Pa., 44 Westm. L.J. 25 (Pa. 1960); Kies v. Erie, 169 Pa. 598, 32 Atl. 621 (1895).

17. Heiden v. City of Milwaukee, 226 Wis. 92, 275 N.W. 922 (1937).

18. Flowers v. Bd. of Comm'rs of County of Vanderburgh, 240 Ind., 668. 168 N.E.2d 224 (1960); Williams v. Town of Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (1949); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939).

It is submitted that when a municipality takes out insurance, the premiums are calculated in accordance to the amount of loss the municipality may incur, taking into account the size of the municipality, the number of functions it engages in, and the fact that the municipality will be immune from most suits by acting in its governmental capacity. To allow recovery on all torts, based on the mere fact that the governmental unit has taken out liability insurance, can have no other effect than to raise the cost of premiums considerably. Such a result would in turn defeat the purpose of governmental immunity by indirectly applying public funds toward payment of a greater number of damage claims.

Under the circumstances shown, it is not necessarily a waste or misuse of public funds to procure insurance while retaining governmental immunity.

R. GORDON NESVIG

UNREASONABLE SEARCHES AND SEIZURES—CONSTITUTIONAL RIGHTS — RETROACTIVE APPLICATION OF MAPP V. OHIO—Plaintiff's hotel room was searched by state officers without a warrant or the plaintiff's consent. Evidence obtained in the illegal search was used against the plaintiff to convict him of murder. The plaintiff made no objection regarding the admissibility of the evidence in court. In reliance on *Mapp v. Ohio*,[1] the accused appealed by federal habeas corpus.[2] The United States Court of Appeals, Fourth Circuit, *held*, two judges dissenting, that the United States Supreme Court opinion declaring evidence obtained by state officers from an illegal search and seizure applies retroactively and prisoner's failure to object to evidence so obtained was excusable and did not result in a forfeit of his constitutional rights. *Hall v. Warden, Maryland Penitentiary*, 313 F.2d 483 (4th Cir. 1963).

The Supreme Court has long held that the use of illegally obtained evidence is unconstitutional and cannot be admitted

1. 367 U.S. 643 (1961).
2. Title 28 U.S.C. § 2254 (1958).