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Municipal Corporations - Torts - Liability of City for Injuries to Prisoner Assaulted by Fellow Prisoner

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MUNICIPAL CORPORATIONS—TORTS—LIABILITY OF CITY FOR INJURIES TO PRISONER ASSAULTED BY FELLOW PRISONER—The plaintiff alleged that agents of the city who were in charge of the jail were "grossly and wantonly" negligent in confining him with another prisoner because they knew of the latter's violent nature and mental instability, and, in failing to seek medical attention for the plaintiff for a period of one day after he was injured. The Supreme Court of Kansas *held* that the municipality was not liable for damages for the negligence or misconduct of its officers or employees when acting in the performance of its governmental functions based on the principle of municipal immunity *Parker v City of Hutchinson,* 196 Kan. 148, 410 P.2d 347 (1966)

The Kansas Court refused to abrogate the doctrine of municipal immunity despite its recognition that the trend of judicial decisions is to restrict, rather than to expand, the doctrine.[1] The origin of the principle of governmental immunity is generally traced to the English case of *Russell v Men of Devon,*[2] and is based on the medieval concept of sovereignty whereby it was believed the King could do no wrong.[3] The *Russell* case was a suit brought against all of the men of Devon, alleging an injury caused by a county bridge out of repair The opinion emphasized the fact that the suit was not based upon a statute, and that there were no precedents in support of the action. Lord Kenyon also noted that, had this experiment succeeded, it would have produced an infinity of actions.[4]

Although the *Russell* case was founded on questionable legal grounds,[5] and even though it would seem somewhat anomalous that the principle of governmental immunity would be adopted in American courts since it was based upon the divine right of kings,[6] the issue has created considerable litigation in this country [7] The distinction is usually drawn in these cases between "governmental" and "proprietary" functions,[8] but in the present case both sides concede that the city was engaged in a governmental function in operating its jail. The plaintiff argued that the time had come for

1. See Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957) Krantz v. City of Hutchinson, 165 Kan. 449. 196 P.2d 227 (1948)
2. 2 T.R. 667, 100 Eng. Rep. 359 (1788).
3. See Molitor v. Kaneland Community School Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).
4. See Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788).
5. The *Russell* case cites no law in support of the decision, although Lord Kenyon noted that "[T]here is a precedent against [the action] in Brooke."
6. See Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
7. *E.g.,* Wendler v. City of Great Bend, *supra* note 1 Holytz v. City of Milwaukee. *supra* note 6.
8. Generally, municipal corporations are not liable for negligent acts while performing their political or governmental functions, but they are liable for their negligence while engaged in private, proprietary, or corporate activities. Wendler v. City of Great Bend, *supra* note 1 at 270.

Kansas to follow the lead taken by other jurisdictions and abrogate the doctrine completely The Kansas Court, however, chose to rely upon stare decisis, together with the pronouncement that this would be an area for legislative, not judicial, action.[9]

The first state to abrogate the doctrine of governmental immunity was Florida, which, in 1957, was presented in *Hargrove v Town of Cocoa Beach*[10] with a situation strikingly similar to that in the instant case. In that case, a prisoner, locked in the city jail and left untended, died of suffocation as the result of a fire. In finding for the plaintiff, the Florida Court said, "[O]ur own feeling is that the courts should be alive to the demands of justice. We can see no necessity for insisting on legislative action in a matter which the courts themselves originated."[11] Since that decision, the courts in Illinois,[12] New Jersey,[13] Michigan,[14] California,[15] Wisconsin,[16] Minnesota,[17] Alaska,[18] Arizona,[19] and Kentucky[20] have abrogated the doctrine.

The Court in Kansas has already abrogated the doctrine of immunity as it applies to charitable institutions,[21] to church corporations,[22] to defects in public streets,[23] and to nuisances maintained by municipalities.[24] But when faced with the factual situation alleged by the plaintiff, the court determined that it is up to the legislature to abolish the doctrine in the area under consideration. The Kansas Court did not deem it necessary to distinguish the earlier immunity cases nor to indicate any conclusive factors which would reflect under what circumstances the court might make further exceptions to the doctrine without legislative action.

The public policy of Kansas, as expressed in that State's Constitution, is that "All persons, for injuries suffered in person,

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9. Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966)
10. Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
11. *Id.* at 132.
12. Molitor v. Kaneland Community School Dist. No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959).
13. McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960) (applies liability only for "active wrongdoing").
14. Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).
15. Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457 (1961).
16. Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962)
17. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).
18. City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962). See also Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963). But see Hale v. City of Anchorage, 389 P.2d 434 (Alaska 1964) (due to the unusual weather conditions in Alaska, that State's Court has modified its ruling to make municipalities immune from suit for injuries caused by ice and snow on sidewalks).
19. Stone v. Arizona Highway Comm'n., 93 Ariz. 384, 831 P.2d 107 (1963).
20. Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964).
21. Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954).
22. McAtee v. St. Paul's Mission, 190 Kan. 518, 376 P.2d 823 (1962).
23. Smith v. Kansas City, 158 Kan. 213, 146 P.2d 660 (1944).
24. Lehmkuhl v. Junction City, 179 Kan. 389, 295 P.2d 621 (1956), Jeakins v. City of El Dorado, 143 Kan. 206, 53 P.2d 798 (1936).

reputation or property, shall have remedy by due course of law, and justice administered without delay"[25] The policy of governmental immunity, which the court of Kansas chose to uphold, was stated by a concurring judge in the *Russell* case to be based on a general principle of law that "[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience."[26] It is curious that any court could follow such totally inconsistent policies and yet not find it necessary to reconcile them, particularly in view of the fact that, when this Court considered tort liability for charitable institutions, it held the above-cited constitutional provision meant that for wrongs recognized by law the court shall be open and afford a remedy[27] The question remains as to why it is necessary to consider this public policy issue as it concerns charitable institutions but not as it concerns municipal corporations.

Notably, there are instances in which the Kansas Legislature has provided for tort liability of governmental units.[28] These statutes are construed by this Court as illustrative of an implied legislative approval of the doctrine of governmental immunity[29] The court fails to consider, however, that legislative inaction could very well merely indicate that individuals who suffer damages as a result of governmental immunity represent a minority who have little lobbying strength in the legislatures.[30] It is ironic that a person has a remedy if the state takes his property,[31] but he has no recourse when he is injured by the state's negligence even when, as in the instant case, he is totally dependent upon the state for his welfare and protection. It was under circumstances like these that the Florida Court took the first step to establish the present trend.[32] Considering the fact that the doctrine of governmental immunity was born in the courts, together with its abrogation previously in Kansas in certain areas and its total abrogation in other states, the instant case presented an ideal opportunity for this

25. KAN. CONST., Bill of Rights § 18.
26. Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359, 362 (1788).
27. See Noel v. Menninger Foundation, *supra* note 21 at 943.
28. KAN. STAT. ANN. ch. 68 § 301 (1963) (provides for liability of counties and townships for defective bridges, culverts and highways) KAN. STAT. ANN. ch. 74 § 4707 (1963) (requires all state agencies to purchase motor vehicle liability insurance) KAN. STAT. ANN. ch. 74 § 4708 (1963) (waives governmental immunity to the extent of the coverage) KAN. STAT. ANN. ch. 12 § 2602 (1963) (permits municipalities to purchase motor vehicle liability and medical payment insurance) KAN. STAT. ANN. ch. 12 § 2603 (1963) (waives immunity to the extent of the amount of insurance obtained by a municipality).
29. See Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966).
30. For another view regarding the legislative role in this area, see the concurring opinion in Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618, 626 (1962). This opinion points out that the reason the legislature might have refused to change the immunity rule was because the court had adopted the rule, therefore the court must "face up to the responsibility of changing a court made rule of law."
31. KAN. STAT. ANN. ch. 26 § 513(a) (1963).
32. See Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

Court to take the initiative and break with an archaic, unjust rule.

North Dakota has a constitutional barrier greatly limiting the scope of the court's power by providing that "suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."[33] Municipal corporations, as creatures of the state,[34] are therefore liable only as established by statute. This is also the rule regarding counties in North Dakota,[35] but a different rule was established by the court for charitable institutions, which are no longer immune.[36] The Legislature has provided for suits against municipal corporations for injuries arising because of defective streets, sidewalks, and bridges.[37] The North Dakota Court considered the governmental immunity doctrine in a 1965 case,[38] and, noting that the previous Legislative Session had recognized the doctrine when it amended and reenacted a statute concerning the "right to claim governmental immunity" by political subdivisions which purchase liability insurance,[39] the court upheld the doctrine. Therefore, it would appear that if any relief is to be forthcoming in the State of North Dakota regarding governmental immunity, such a change will have to be made by statute or constitutional amendment.

JOHN D. OLSRUD

LIENS—MECHANICS' LIENS—RIGHT TO AND PERFECTION OF LIENS —Plaintiff brought action to foreclose a mechanics' lien against the property owners and also a mortgagor and judgment creditor who claimed first priority on the property Plaintiff's claim to the mechanics' lien hinged on whether a certain item delivered was actually used in construction of the defendant's house and whether plaintiff had perfected his lien according to statute. The Supreme Court of Kansas *held* that the mechanics' lien would not attach because it was not proven that the item in question was actually used in construction and thus the statement required to perfect the lien

33. N.D. CONST., § 22.
34. N.D. CONST., § 130. See Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
35. Mayer v. Studer & Manion Co., 66 N.D. 190, 262 N.W 925 (1935).
36. Granger v. Deaconess Hosp. of Grand Forks, 138 N.W.2d 443 (N.D. 1965) Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946).
37. N.D. CENT. CODE § 40-42-01 (1960).
38. See Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
39. N.D. CENT. CODE § 40-43-07 (Supp. 1965). For a discussion of the effect of liability insurance on governmental immunity, see 39 N.D.L. REV. 358 (1963).