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Torts--Illinois Overthrows School District Tort Immunity

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> the issuance of the permit does not constitute reliable, probative, or substantial evidence which would support the denial of such permit.[5]

The court did not indicate what evidence would be sufficient to support a church's objection to the issuance of a liquor license. It appears that a church is in no better position to object for moral reasons than would be any individual party who held similar beliefs. Thus, the proximity of the physical location of the church only gives it the right to be personally notified of any permit applications of neighbors within five hundred feet of such location. But, if the church has no ground upon which to oppose the issuance of the permit other than the moral issue, it might just as well ignore the notice. It had been thought that section 4303.26 was passed purely for the benefit of the institutions enumerated therein.[6] It would simply aid them in maintaining their dignity and respect in the community without having to go to court to defend the same and without having to show material damage, which might not be possible. Whether mere notice now can be considered a benefit is highly doubtful. If a hearing is still desired, the institution involved will have to go to great length and probably great expense to provide substantial evidence which would justify a denial of a permit by the Director of Liquor Control.

In view of the decision in the *Corwin* case, it can hardly be said that the institutions involved are in a preferred position in objecting to the issuance of liquor licenses. Looking at the statute one can only guess as to what its purpose might be. At this point it appears to be little more than mere verbiage. With the resultant sterilization of this law by the *Corwin* decision, it is not unlikely that many liquor permit applicants, denied a license in the past because of the proximity of their location to a church, will seek to reopen their applications for further hearings. Thus, a rather stable and well-accepted doctrine has been thrown into chaos, and those who are affected by this decision are left in a state of confusion.

JOHN R. WERREN

TORTS — ILLINOIS OVERTHROWS SCHOOL DISTRICT TORT IMMUNITY

> The King is the vicegerent and minister of God on earth: all are subject to him; and he is subject to none but to God alone.[1]
>
> . . . .
>
> The King can do no wrong.[2]

These ancient tenets support the doctrine of sovereign tort immunity. This doctrine, which honors the divine right of kings, reached its zenith

5. Corwin v. Board of Liquor Control, 170 Ohio St. 304, 308 (1960).
6. Meyer v. Dunifon, 88 Ohio App. 246, 94 N.E.2d 471 (1950).

in Elizabethan England; today, nearly half a millennium later, it continues to flourish with pristine vigor in many of the states.

This is an odd and unfortunate history — one which in its latter reaches has been marked by the obstinacy and sophistry of American courts and legislatures. This obstinacy may be seen in the unyielding adherence to precepts which evolved in the Middle Ages when democratic principles enjoyed little application. The sophistry may be seen in the subtle but feeble abstractions which in some quarters have deposed the original dogma and which are now used to disguise unjustifiable "public policies."

The Supreme Court of Illinois followed neither of these objectionable courses in deciding *Molitor v. Kaneland Community Unit District Number 302.*[3] That court, in a five-to-two decision, found that the doctrine of school district tort immunity is "unjust, unsupported by any valid reason and has no rightful place in modern-day society."[4] The uncommon boldness of this conclusion invites an examination of the case.

The situation which confronted the court was a familiar one. The appellant, a school child, had been injured as the result of a school-bus accident allegedly caused by the negligence of the bus driver. The trial court sustained the defendant's demurrer on the authority of an 1898 case[5] which had extended the state's governmental-immunity shroud to school districts. After an unsuccessful attempt for reversal on constitutional grounds, another appeal was taken to the high court, in which the appellant forthrightly petitioned for the total abolition of school district tort immunity. On this occasion the reception by the court was sympathetic.

Commencing with a survey of the immunity doctrine's status within Illinois, the court noted that the state had held itself open to liability up to $7,500 for the negligence of its officers, agents and employees;[6] that the Workmen's Compensation and Occupational Disease Acts had subjected governmental units, including school districts, to liability;[7] and that cities and villages had been made directly liable for certain tortious acts of their agents.[8] It noted further that companies insuring school districts against school-bus accidents could not refuse payment on the policies by invoking the immunity rule,[9] the court observing with dis-

1. 1 BLACKSTONE, COMMENTARIES *241, *242 (Lewis ed. 1897), quoting Bracton.
2. *Id.* at *245.
3. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).
4. *Id.* at ___, 163 N.E.2d at 96.
5. Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536 (1898).
6. ILL. REV. STAT. ch. 37, §§ 439.1-.24 (1957).
7. ILL. REV. STAT. ch. 48, §§ 138.1, 172.36 (1957).
8. ILL. REV. STAT. ch. 24, §§ 1-13,-16 (1957).
9. ILL. REV. STAT. ch. 122, § 29-11a (1957).

pleasure that this provision led to the unseemly result of granting recovery to one injured by a bus of an insured district and denying recovery to one injured by a bus of an uninsured district.

The majority of the court was of the conviction that these legislative modifications not only illustrated the random and inequitable consequences of the immunity doctrine, but also revealed a disposition of the legislature to mitigate its harshness.[10]

Passing next to a consideration of the doctrine itself, the court found itself faced with the cumbrous body of metaphysics that sustains the maxim that the "sovereign can do no wrong." Rather well-defined patterns emerge from this intellectual scheme; the following are representative: the state can do no wrong because it is above wrong; the state as maker of the law must be above the law;[11] the state, even if it commits a wrong, may not be sued because no court may take jurisdiction over that which has created it; since the state can do no wrong, it cannot authorize another to do a wrong for it and, therefore, the wrongful acts of its agents must be ultra vires.[12]

The court did not trouble itself with these theories; it brushed them aside by reiterating these words of another court:

> It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts. . . .[13]

For the curious there exists a mass of scholarly literature devoted to critical discussion of these legalistic conceptions.[14] In passing, it may be mentioned that the arguments have something of a common ground of attack, namely, the unreality of the logic which purports to liken the democratic state, which exists only as an institution, with the English king, who existed both as a person and as an institution.

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10. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, ___, 163 N.E.2d 89, 92 (1959).

11. Mr. Justice Holmes was a notable supporter of this Augustinian concept. In Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), he said that "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends."

12. See generally, 2 HARPER & JAMES, TORTS 1607-19 (1956).

13. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, ___, 163 N.E.2d 89, 94 (1959), quoting the opinion in Barker v. City of Santa Fe, 47 N.M. 85, 88, 136 P.2d 480, 482 (1943).

14. See, *e.g.*, Borchard's masterly analysis and discussion of the immunity doctrine in *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925) and *Governmental Responsibility in Tort VI*, 36 YALE L.J. 1, 757, 1039 (1926-1927); WATKINS, THE STATE AS A PARTY LITIGANT (1927); Shumate, *Tort Claims against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942). For a comprehensive review of the immunity rule's status in the various states, see Lefler & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363 (1954).

The purely mechanical deference which is today paid by the courts and legislatures to these concepts leaves open to doubt the value of giving them prolonged attention. With the favorable solution of analogous theoretical problems in the law of business corporations, the legal notions supporting sovereign immunity may be said to persist today more in sound than in substance.

On the other hand, the policy arguments which have been advanced in defense of sovereign immunity pose questions of considerable importance. In the instant case, the defendant school district contended that the payment of tort claims would be a wrongful diversion of public tax monies set aside for educational purposes and that the discarding of the immunity shroud would create grave and unpredictable problems of school district finance and administration.[15]

The first of these arguments looks to the "protection of public funds," and brings to play the "no fund" or "trust fund" theory which has achieved a certain vogue in actions against charitable institutions. The theory, simply, is that payment of tort claims from tax monies allotted for educational purposes is a wrongful diversion of funds for an improper purpose. The weakness of this argument, as the court pointed out,[16] lies in the fact that it assumes that which it seeks to prove, *viz.*, that payment of tort claims is not a proper purpose. Inclined from the outset to view damage claims as proper "purposes" for the expenditure of school funds, the court, after analyzing relevant provisions of the Illinois School Code,[17] felt compelled to affirm these inclinations. Since tax funds could be properly spent to pay premiums on school district liability insurance, there seemed to be no convincing reason why such funds could not be used to pay the liability itself in the absence of insurance.[18] It was realized that such a determination would have the salutary effect of ending the grossly unfair practice of finding "liability" where insurance funds are available and no liability where they are lacking.

The second of the policy arguments offered by the defendant had at its core the contention that the shedding of the immunity rule would bring financial ruin upon the school districts. The synthetic gloom of this familiar argument is deftly exposed by these words quoted by the court:

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15. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, ___, 163 N.E.2d 89, 94, 95 (1959).

16. *Id.* at ___, 163 N.E.2d at 94.

17. ILL. REV. STAT. ch. 122, § 17-6.1 (1957) authorizes appropriations for "transportation purposes"; ILL. REV. STAT. ch. 122, § 19-10 (1957) authorizes issuance of bonds for the "payment of claims"; ILL. REV. STAT. ch. 122, § 29-11a (1957) authorizes the expenditure of school tax funds for payment of premiums for liability insurance covering school bus operations.

18. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, ___, 163 N.E.2d 89, 95 (1959).

> This argument is like so many of the horribles paraded in the early tort cases when courts were fashioning the boundaries of tort law. It has been thrown in simply because there was nothing better at hand.[19]

It is a fundamental principle running through the law of torts that liability follows negligence and that individuals and organizations must be responsible for the negligence of their agents and employees. Private corporations have not met bankruptcy because of tort liability; rather they have come to regard it as a usual item in their budgets. Adequate insurance coverage, they have learned, not only protects from untoward contingencies, but also permits convenient adjustment to the administrative problems incident to tort liability. No credible reason was proffered to show that governmental agencies are incapable of making a like adjustment to tort liability. The court, therefore, rejected this argument.

Having been defeated on grounds of theory and policy, the defendant introduced still another of the "horribles" common to immunity cases. The argument was made that if school district tort immunity were to be abolished, this abolition could only be effected by the legislature. To this the court answered that immunity had been extended to school districts by the courts and since they had "closed their courtroom doors without legislative help" they could re-open them without the aid of the legislature.[20]

Next in question was the matter of stare decisis. The court appears to have experienced little regret in departing from this doctrine. Indicating that it is of limited importance in the law of torts, the court resolved that it must be passed over where new concepts of justice and social needs impose a duty upon a court to reverse itself.[21]

Not so easy of solution was the question of what application to give the decision. Retrospective application would have brought great hardship to the school districts, many of which were uninsured; a truly prospective application would have reduced the decision to dictum and would have denied the appellant any reward for his efforts, thereby eliminating any incentive to litigants to seek the overturn of obsolete laws. To settle this problem a compromise was reached by which the application of the decision was made prospective except as to the appellant.[22]

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19. *Id.* at ___, 163 N.E.2d at 95, quoting Green, *Freedom of Litigation,* 38 ILL. L. REV. 355, 378 (1944).

20. *Id.* at ___, 163 N.E.2d at 96.

21. *Ibid.*

22. *Id.* at ___, 163 N.E.2d at 97. The dissenting opinion described this compromise as "untenable" for these reasons: that it was an "aborted" peculiarity supported only by thin authority; that it imposed a hardship on the defendant school district which had justifiably relied on the immunity rule; and that appellant was only one of eighteen children who had been similarly injured in the same accident. *Id.* at ___, 163 N.E.2d at 98 (dissenting opinion).

With this final matter resolved, the end came to school district tort immunity in Illinois.[23] The opinion of *Molitor v. Kaneland Community Unit District Number 302* lays bare an outmoded and, in current times, a pernicious doctrine. Hopefully, its influence will be felt by other courts and other legislatures.

GEORGE DOWNING

23. In response to this decision the General Assembly passed a bill limiting recovery to $10,000 in any separate cause of action against a public school district or a non-profit private school. ILL. REV. STAT. ch. 122, §§ 821-31 (Supp. 1959).

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