Government Liability in Tort--Schools and Municipal Corporations

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STUDENT NOTES AND RECENT CASES

GOVERNMENTAL LIABILITY IN TORT—SCHOOLS AND MUNICIPAL CORPORATIONS.—P, an infant, attended the Weirton High School at Weirton, West Virginia, and in the course of performing his duties as a student at said school and while engaged in work in the manual training department thereof, under the direction and instruction of the principal of the school, he was required to use a planing machine equipped with sharp knives and not equipped with a guard. Without fault on P’s part and only because of the improper and insecure condition of the said machine, P’s hand was caught by the unguarded knives of the machine and certain of the fingers of his left hand were cut off. P sued the Board of Education in tort, based on negligence. After D’s demurrer had been sustained, the ruling was certified to the Supreme Court of Appeals by joint application of the parties. Held, a school board is not subject to liability for injuries to pupils of public schools, suffered in connection with their attendance thereat, since such district in maintaining schools, acts as an agent for the state, and performs a purely public or governmental duty imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage.¹

That this decision is in accord with the weight of authority in the United States is undisputed.² The case, however, is, as the court says, apparently one of first impression in West Virginia and the court was not bound by any state precedent directly in point.

Notwithstanding this almost overwhelming collection of decision

and text authority, it is submitted that the result reached is socially undesirable. If the only remedy is in legislative enactment, as the West Virginia court points out in the Krutili case, then the legislature should act without delay. On the other hand the remedy may be in the courts under the present statutes. It is not the purpose of the author, however, to criticize either the court or the legislature, but merely to point out the social need for a remedy in such cases.

At the beginning of a discussion of governmental liability in tort, one favoring liability is unnerved by the almost total lack of any authority except that which denies liability in cases where the tort results from the exercise of a governmental function. The maxim of Blackstone that the King can do no wrong so impressed itself upon early English and all American law that it is rarely, if ever, questioned. And, wonder of wonders, it is first questioned, not in the land which never had Kings, but in its monarchical home, and the nation which in a great part owes its founding to the desire to escape Kings still enforces it, but of course for the benefit of a different sovereign.

In the United States, but little authority can be found to support liability in such cases without the aid of an express statute. In maritime law there is at least one United States Supreme Court case which imposes such liability without the aid of a statute.

In the state reports only one state, New York, can be found which consistently and uniformly imposes liability without the aid of an express statute. One other state, Ohio, in an excellent

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6 BLACKSTONE'S COMMENTARIES, Book 1, Ch. 7, p. 246, "The King can do no wrong." Also Book 1, Ch. 7, p. 244, "It is—a maxim—that the King himself can do no wrong."
5 See on this point Redfield v. Kittitas County School District No. 3, 48 Wash. 85, 92 Pac. 770 (1907) holding a school district liable for the negligent scalding of a child, under a statute imposing liability on a school district for an injury arising from its act or omission. Stovall v. School District, 110 Wash. 97, 188 Pac. 129 (1912).
opinion and concurring opinion started out in 1919 evidently with the object of handing out substantial justice in this connection. But in two later cases decided only three years later, swung squarely around, expressly reversed the former decision, and again fell in line with the great weight of American authority. This practically completes the list of American authorities against the American construction of Blackstone's maxim, except where the liability is imposed by statute, or where the function is private and not governmental, or where a nuisance can be made out of the cause of the injury.

"The reason for this long continued and growing injustice in Anglo-American law rests, of course, upon a mediaeval English theory 'that the King can do no wrong', which without sufficient understanding was introduced with the common law into this country and has survived mainly by reason of its antiquity." The most peculiar circumstance of the history of this maxim is that the construction placed upon it by the English courts was that the immunity of the king was purely personal, and as Borchard says, "it is one of the mysteries of legal evolution" how this immunity came to be applied in the United States where prerogative is unknown and the mystery deepens when one considers that the petition of right was created in England as far back, perhaps, as the reign of Edward I to alleviate the evident injustice, and yet the great majority of American jurisdictions follow it almost blindly.

As was intimated at the beginning of this discussion, the only remedy may be in the legislature. However, it is the humble opinion of the author that it is in the courts also, provided the courts choose to act. In the New York cases, cited supra, the liability

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8 Fowler v. City of Cleveland, 100 Oh. St. 158, 126 N. E. 72, 9 A. L. R. 131 (1919), imposing liability for an injury resulting from the negligent driving of a fire truck.
9 Aldrich v. City of Youngstown, 106 Oh. St. 342, 140 N. E. 164, (1922), and Board of Education, etc., v. McHenry, 106 Oh. St. 357, 140 N. E. 169 (1922).
12 Kauffman v. Tallahassee, 100 So. 150 (Fla. 1924).
13 Edwin M. Borchard, note, 34 YALE L. J. 1, 2. And see also that writer's opinion in the footnote on page 2, based on Ehrlich, Proceeding Against the Crown (1921) 42, 49, that the maxim was misunderstood even by Blackstone and Coke. It is the humble opinion of the author, however, that Blackstone did understand the maxim he was using and that a full reading of sections 1 and 2 of Ch. 7 of Book I of Blackstone's Commentaries will show that what Blackstone meant by this is, first, that mistakes are not to be imputed to the King and, secondly, "it means that the prerogative of the Crown extends not to do any injury", and that the misunderstanding has arisen from the construction placed thereon by commentators and judges.
14 34 YALE L. J. 4.
15 YALE L. J. 5.
is based on a statute which provides that it is the duty of the board of education to provide for "prompt and efficient" repairs.\textsuperscript{18}

Our West Virginia statute in this regard\textsuperscript{17} is certainly as strong as the New York statute, if not stronger, especially if read in connection with section 46 of the same chapter,\textsuperscript{18} and it is submitted that the result obtained, would be, socially at least, much more desirable if the New York cases were followed.

Take for instance the facts of the West Virginia case first cited,\textsuperscript{19} which was the immediate provocation for this discussion. A child is required to go to school by statute. While there he is ordered to use an unguarded planing machine. Through no fault of his own he is injured and handicapped for the remainder of his life by negligence which can be clearly placed, and yet he can recover not one cent. And his recovery is barred, not by anything which the child might possibly have avoided, but by a misunderstood and inapplicable maxim of Blackstone. At the time of the 14th amendment to the Federal Constitution, or even at the time of the formation of this state, there might have been some practical foundation for such a rule, as conditions have been such, at times in the past, that a state or its agencies could not pay its debts and endure. But at the present time, when governmental activities are manifolding almost daily, increasing the hazard to the individual, although for the public good, and government is on a firm financial basis, not even much of this so-called "practical" reason for such an unjust rule exists.

The Legislature of West Virginia recognized this in imposing liability by statute upon municipal corporations for injuries caused by roads and streets being "out of repair."\textsuperscript{21} If the courts will not, upon authority of the two sections of the code which are applicable,\textsuperscript{22} impose liability upon school boards for such outrageous

\textsuperscript{16} See especially in this connection the M'Carton case, 133 N. Y. Sup. 939 (1912) at page 942 and statutes there cited.

\textsuperscript{17} Barnes' W. Va. Code, 1923, Ch. 45, § 50, "Said board shall provide such furniture, fixtures, and apparatus for said school houses and other buildings as may be necessary for the effectiveness of the schools and for the convenience, health, and cleanliness of the pupils thereof, including fuel and other necessary supplies and shall cause the school grounds, school houses, and the furniture, fixtures, and apparatus therein to be kept in good order and repair, — ."

\textsuperscript{18} Barnes' W. Va. Code, 1923, Ch. 45, § 46, "The Board of Education of each district, shall be a corporation by the name of The Board of Education of the District of .........., in the County of .......... and as such may sue and be sued, pleaded and be implicated, contracted and be contracted with — ."

\textsuperscript{19} Supra, n. 1.

\textsuperscript{20} Barnes' W. Va. Code, 1923, Ch. 43, § 122 which makes his parent or guardian liable to prosecution for a misdemeanor if the child does not attend, unless excused.

\textsuperscript{21} Barnes' W. Va. Code, 1923, Ch. 43, § 167, Acts 1921, Ch. 112.

\textsuperscript{22} Barnes' W. Va. Code, 1923, Ch. 45, §§ 46 and 50.
acts of negligence, of course the only remaining source of remedy is in the legislature. It is suggested, however, that the courts of West Virginia could, with the aid of the two statutory provisions cited, reach the same result that the New York court reached and at the same time make justice and the law congruous on the point.23

—C. M. L., JR.

23 Governmental liability in tort is discussed herein only with particular reference to boards of education. For a full and comprehensive discussion of the entire subject see 34 Yale L. J. 1, et seq. See also 34 Harv. L. Rev. 66.