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of property in a non-impacted area; in fact, the averages show he is bearing less.[27] This is further borne out in the chart above since the average local contribution of all the cities included is $143 per pupil. The non-impacted cities provide an average of $158 per pupil in local support.

The above data would also indicate that the impacted school districts are receiving an average of $157 per pupil in aggregate state aid while those districts not receiving federal funds are receiving an average of $149 per pupil. The average for all districts is $153 per pupil. Similar results are reached when just the *state supplementary share* is considered. The average payment by the State for this supplementary aid is $34 per pupil in all cities, with $43 per pupil in the impacted areas and $25 per pupil in the non-impacted areas.

It becomes quite apparent that the Virginia formula for calculating state aid to local school districts is not inequitable to the impacted areas. To the contrary, it seems that the Virginia formula, even with its resulting deduction of the federal funds, favors these impacted areas. It would thus appear that the State formula can be reconciled with the intent and purpose of the Federal Act. The formula in fact has provided additional state funds to these impacted areas to assure that the quality of education is equal to that in other parts of the State.

The court in *Shepheard* made no investigation into the actual distributions under the state formula. Had they done so, a different conclusion might have been reached; one commensurate with the standards which must be applied to state legislation prior to its being held unconstitutional.

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LIABILITY OF A PUBLIC OFFICER FOR NONFEASANCE UNDER 42 U.S.C. § 1983

The Civil Rights Act, 42 U.S.C. § 1983,[1] imposes civil liability on a public officer who does some act under color of law which deprives

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[27]DEPARTMENT OF TAXATION, COMMONWEALTH OF VA., LOCAL TAX RATES TAX YEAR 1967, at 11 (1967).

[1]The statute reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (1964).

another of his constitutional rights.[2] Since he is tortiously liable for depriving another of his constitutional rights, the officer is said to have committed a "constitutional tort."[3] While general tort liability may be imposed on a private individual for failing to perform a duty which the law obligates him to perform, no civil rights case has suggested that such liability be imposed on a public officer for his failure or refusal to perform an official duty.

Addressing itself to this problem, *Huey v. Barloga*[4] suggests that a public officer may be held tortiously liable under § 1983 for inaction—as well as action—if such inaction (*i.e.*, nonfeasance) results in the deprivation of another's constitutional or civil rights.[5] In *Huey*, a Negro college student was attacked, beaten and killed by a group of white youths on a street in Cicero, Illinois. The decedent's father[6] filed a complaint against the trustees, employees and agents of the town of Cicero, seeking damages for the death of his son. The complaint as drawn did not rely on § 1983; rather it was drawn in two counts under sections 1985 and 1986.[7] The first alleged an action for conspiratorial inaction by the defendants in failing "to prevent or aid in preventing the denial of equal protection of the laws to Jerome Huey [decedent] because of his race."[8] The second count, filed under § 1986, asserted an action for damages and alleged that the conspiracy and "wrongful neglect of the defendants was the direct and proximate cause of the death of Jerome Huey."[9]

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[2]*See, e.g.*, Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963) (arresting and holding a plaintiff without filing charges against him); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) (use of excessive force in effecting an arrest); Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966) (excessive force); Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Calif. 1964) (arrest prompted by malice); Antelope v. George, 211 F. Supp. 657 (D. Idaho 1962) (unlawful arrest).

[3]A term used by law review writers to signify the civil action created by 42 U.S.C. § 1983 (1964). *See* Shapo, *Constitutional Tort: Monroe v. Pape, And The Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015, 1028 (1967).

[4]277 F. Supp. 864 (N.D. Ill. 1967).

[5]*Id.* at 872-73.

[6]The father has standing to sue because the federal court adopts the wrongful death statute of the state in which it is sitting. The Illinois statute provides for survival of the action. ILL. ANN. STAT. ch. 70, § 2 (1959). *E.g.*, Galindo v. Brownell, 255 F. Supp. 930 (S.D. Calif. 1966) (adopting California statute in § 1983 action by decedent's mother); Brazier v. Cherry, 293 F.2d 401, 409 (5th Cir. 1961) (adopting Georgia statute in § 1983 action by surviving widow).

[7]42 U.S.C. §§ 1985, 1986 (1964). Section 1985 deals with a *conspiracy* to deprive persons of their constitutional rights, privileges, or immunities. Section 1986 deals with the situation where one person has knowledge of such conspiracy and, "having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so...."

[8]277 F. Supp. at 868.

[9]*Id.*

The complaint was dismissed on both counts. With respect to § 1985, the court stated that the plaintiff failed to allege a purposeful intent to discriminate by the defendants, and that the factual allegations of the complaint were merely conclusory.[10] Since § 1986 is "derivative in nature... [if] the plaintiff has not alleged facts sufficient to establish an action under section 1985, it follows that a derivative action under section 1986, premised on the same insufficient conclusory allegations, cannot be sustained."[11] However, the court also examined the allegations of the complaint in order to determine whether a cause of action had been stated under § 1983, which does not involve an element of conspiracy as do sections 1985 and 1986.

The Tort Concept of Nonfeasance Under § 1983

It should be noted that § 1983 was originally part of the *Ku Klux Klan Act of 1871*.[12] The most important part of that Act was thought to be the section which imposed criminal penalties rather than civil liability.[13] Later it was recognized that the Act could be used as a basis for the recovery of damages by plaintiffs who were denied the right to vote.[14] In 1939, the Supreme Court held that § 1983 could be relied upon as the foundation of an action for injunctive relief.[15] Two years later, a case brought under the criminal counterpart to § 1983 indicated that an indictment could be founded upon an allegation of misuse of power possessed by public officers, if such misuse adversely affected the civil rights of another.[16] Finally, in 1961, the Supreme Court made it clear in *Monroe v. Pape*[17] that an action under § 1983 was a tort action and, as such, "should be read against a background of *tort liability* that makes a man responsible for the natural consequences of his actions."[18]

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[10]*Id.*

[11]*Id.* at 875.

[12]*See* Shapo, *Constitutional Tort: Monroe v. Pape, And The Frontiers Beyond*, 60 Nw. U.L. REV. 277, 279 (1965).

[13]*Id.*

[14]Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

[15]Hague v. Committee for Indus. Organization, 307 U.S. 496 (1939).

[16]United States v. Classic, 313 U.S. 299, 326 (1941). The indictment was filed under the predecessor statutes to 18 U.S.C. §§ 241, 242 (1964).

[17]365 U.S. 167 (1961).

[18]Monroe v. Pape, 365 U.S. 167, 187 (1961) (emphasis added). Courts have stressed various forms of tort liability in civil rights cases, particularly § 1983 actions, since the landmark decision in *Monroe v. Pape. See, e.g.*, Pierson v. Ray, 352 F.2d 213, 221 (5th Cir. 1965), *aff'd in part, rev'd in part on other grounds*, 386 U.S. 547 (1966); Bowens v. Knazze, 237 F. Supp. 826, 827-28 (N.D. Ill. 1965);

Huey takes this general notion of tort liability a step further by introducing the concept of nonfeasance into the field of civil rights suits. This is entirely consistent with the language of § 1983 which makes it clear that one who "*causes* to be subjected, any citizen... to the deprivation of any rights... shall be liable to the party injured...."[19] In other words, the public officer need not do an act which directly results in the deprivation of civil rights. If, for example, private individuals engage in discriminatory action under a statute which allows such discrimination, a cause of action may lie against the public officers responsible for the enforcement of that statute.[20] The theory is that by continuing a policy of enforcing a discriminatory statute, the public officers are condoning the actions of the private individuals and are therefore indirectly causing the discrimination themselves.[21] Unless they intervene to prevent discrimination, the officers may be held liable under the concept of nonfeasance.

Huey recognizes an affirmative duty on the part of public officers to take reasonable precautions to protect the oppressed.[22] As stated by the court:

> The defendant is not usually held to be responsible for inaction. However, where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his omission. He is responsible if his omission is unreasonable in light of the circumstances.[23]

Therefore, if this duty is not performed, the officer may be liable.[24] However, the officer is not held to any greater standard of care than the reasonably prudent man.[25] He must not be expected to be everywhere at all times, and an action based on such a theory of omnipresence will fail.[26]

Antelope v. George, 211 F. Supp. 657 (D. Idaho 1962); Selico v. Jackson, 201 F. Supp. 475, 478 (S.D. Calif. 1962); *cf.* W. PROSSER, TORTS § 54 (3d ed. 1964).

[19]42 U.S.C. § 1983 (1964) (emphasis added); Pritt v. Johnson, 264 F. Supp. 167, 169 (M.D. Pa. 1967).

[20]Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963) (by implication), *cert. denied*, 376 U.S. 910 (1964).

[21]*Id.* at 205-06 (by implication).

[22]277 F. Supp. at 872-73.

[23]*Id.* at 872. This quotation is taken from the court's analysis of the complaint in light of § 1983.

[24]*Id.* at 873.

[25]RESTATEMENT (SECOND) OF TORTS § 314A, comment f at 120 (1965); *cf.* Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), *overruled on other grounds*, Cohen v. Norris, 300 F.2d 24, 29-30 (9th Cir. 1962). In *Agnew* the court said that "[n]o one has a constitutional right to be free from a law officer's honest misunderstanding of the law or the facts in making an arrest." 239 F.2d at 231.

[26]277 F. Supp. at 872; *see, e.g.*, VA. CODE ANN. § 19.1-171 (Repl. Vol. 1960).

Procedural Requirements of a Cause of Action Under § 1983

There are three elements which constitute a cause of action under § 1983. The defendant must have (1) done some act (2) under color of law, which (3) deprived the plaintiff of some constitutional right. Procedurally, it appears that since this is a tort created purely by federal statute, the necessary elements must be alleged with some degree of particularity.[27] Although the court premised its discussion of § 1983 on the theory that a complaint is not to be dismissed if it states a ground for relief under any possible legal theory,[28] it decided the complaint was insufficient to state a cause of action under § 1983 as well as sections 1985 and 1986. However, the dismissal of the complaint in *Huey* is consistent with the holdings in other civil rights cases.[29]

Though federal courts generally allow liberal construction to be given to complaints,[30] something more seems to be required of a complaint filed under the civil rights statutes. For example, if the plaintiff fails to specifically allege an act under color of law by the defendant, the complaint may be viewed as nothing more than a claim of ordinary tort liability. This apparent procedural requirement may stem from the idea that a civil rights action has certain moral overtones to it; certainly this seems to be true with respect to a case that involves an element of fraud which is required to be specifically pleaded by the Federal Rules.[31] Another possibility is that a complaint filed under § 1983 is analagous to a criminal indictment in which only unnecessary elements may be omitted.[32] In any event, it appears that the elements of a § 1983 cause of action, as set forth in the statute, serve

[27]Powell v. Workmen's Compensation Bd., 327 F.2d 131, 137 (2d Cir. 1964); Sarelas V. Sheehan, 326 F.2d 490, 491 (7th Cir. 1963); Dye v. Cox, 125 F. Supp. 714, 715 (E.D. Va. 1954); Jinks v. Hodge, 11 F.R.D. 346, 348 (E.D. Tenn. 1951). Furthermore, these allegations must be highly specific. *See, e.g.,* United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215, 216 (3d Cir. 1962); Stiltner v. Rhay, 322 F.2d 314, 316 (9th Cir. 1963); Fowler v. United States, 258 F. Supp. 638, 645 (C.D. Calif. 1966); Pugliano v. Staziak, 231 F. Supp. 347, 349 (W.D. Pa. 1964); Roberts v. Barbosa, 227 F. Supp. 20, 22 (S.D. Calif. 1964).

[28]277 F. Supp. at 872; *see also* Nord v. McIlroy, 296 F.2d 12, 14 (9th Cir. 1961); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); 2A J. MOORE, FEDERAL PRACTICE § 8.14 (2d ed. 1967); FED. R. CIV. P. 8(f).

[29]*E.g.,* United States *ex rel.* Hoge v. Bolsinger, 311 F.2d 215 (3d Cir. 1962); Beauregard v. Wingard, 230 F. Supp. 166 (S.D. Calif. 1964).

[30]Jenks v. Henys, 378 F.2d 334, 335 (9th Cir. 1967); Due v. Tallahassee Theatres, Inc., 333 F.2d 630 (5th Cir. 1964); Eaton v. Bibb, 217 F.2d 446, 448 (7th Cir. 1955), *cert. denied,* 350 U.S. 915 (1955). The allegations contained in a complaint filed in a federal court are taken as true. Love v. Navarro, 262 F. Supp. 520 (C.D. Calif. 1967).

[31]FED. R. CIV. P. 9(b).

[32]*See, e.g.,* VA. CODE ANN. § 19.1-171 (Repl. Vol. 1960).

a double purpose. First, they point out what constitutes a cause of action under the section; and, second, they define what must be set forth in the complaint in order to justify federal jurisdiction.

Furthermore, *Huey* suggests that without this procedural requirement of specificity, the floodgates may be opened and the federal courts would be swamped with ordinary tort suits filed under the guise of § 1983. It should be remembered that a civil rights claim is not a "garden variety tort."[34] If it were, the plaintiff would have to bring suit in the state courts. As a result, the complaint must indicate something more than an ordinary tort based upon state law.[35]

While some type of participation must be alleged,[36] *Huey* suggests that it may be alleged in the form of inaction, or the failure of the defendant to perform his duty when he had knowledge of discriminatory practices being carried on by others.[37] In *Huey,* the plaintiff alleged that the defendants had notice of the presence of of Negroes in Cicero. However, there was no allegation of the presence of hostile whites or of any specific act, or failure to act, by the defendants which proximately caused the death of Jerome Huey. Had such allegations been made, the complaint would probably not have been dismissed. The suggestion is that an allegation of an *act of inaction* coupled with the knowledge of the presence of hostile whites, would have sufficed. If such allegations had been made, the court might have retained jurisdiction "until the true facts, or at least

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[33]The court stated that "[p]ublic officials are not the guarantors of the safety of all persons present in the community. If they were, every victim of a crime would have a cause of action against them." 277 F. Supp. at 872.

[34]Rogers v. Provident Hospital, 241 F. Supp. 633 (N.D. Ill. 1965). The complaint was filed under §§ 1983, 1985 and 1986, against a private hospital and two Chicago police officers. The plaintiff alleged that he was injured in an automobile accident and that the officers took him to the hospital where he requested and was refused immediate medical care. He further alleged that while at the hospital the officers assaulted him and then transferred him to a police station where he was jailed. Plaintiff alleged that he sustained permanent injuries as a result of the actions of the officers and the employees of the hospital.

Dismissing the complaint, the court stated: "The Federal Civil Rights Act was never intended to supercede state law regarding recovery for breach of an individual's duty to render necessary medical care and treatment. Rather it is designed to correct official abuse of power resulting in a deprivation of federally protected rights." 241 F. Supp. at 639.

[35]*Id.* at 639. However, it has recognized that "the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe v. Pape, 365 U.S. 167, 196 (1961) (concurring opinion).

[36]277 F. Supp. at 872; Runnels v. Parker, 263 F. Supp. 271, 273 (C.D. Calif. 1967); Jordan v. Kelly, 223 F. Supp. 731, 737, 739 (W.D. Mo. 1963).

[37]277 F. Supp. at 872; *accord,* Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967) ("State action" requirement under § 1983).

[plaintiff's] ... contention as to the facts, had been made clear."[38] It should be enough to allege that the actions of the defendant were merely unreasonable or arbitrary,[39] or that they simply evidence a misuse[40] of his public powers. For example, it appears that had the plaintiff alleged that a defendant officer saw Jerome Huey being attacked and beaten and did nothing, the requisite overt act would have been present in the form of nonfeasance and the complaint would not have been dismissed.

Conclusion

Presently, plaintiff's lawyers recognize and emphasize the element of civil liability under § 1983. A list of various tort concepts is increasingly apparent in actions brought under the statute.[41] *Huey* suggests the addition of the tort concept of nonfeasance to that list. If a deprivation of rights is caused by the actions of private individuals (in the instant case, the assailants) and because of the nonfeasance of public officers[42] (the trustees, employees and agents of Cicero), a complaint under § 1983 should stand. As long as there is an allegation of a causal connection between the officer's nonfeasance and the resulting discrimination,[43] *Huey* indicates that a tort action for negligence may be brought under § 1983. The decision seems to be a response to the concern of some who feel that § 1983 is inadequate,[44] or that it has been circumvented and emasculated.[45] The tort characteristics and concepts, now deemed to be inherent in § 1983, have been brought to the forefront and the potentiality of the concepts being used as a basis for tortious liability is still in its infancy.

ALFRED J. T. BYRNE

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[38]Sheridan v. Williams, 333 F.2d 581, 583 (9th Cir. 1964).

[39]Marland v. Heyse, 315 F.2d 312, 314 (10th Cir. 1963); Baker v. St. Petersburg, 252 F. Supp. 397, 399 (M.D. Fla. 1966); Valle v. Stengel, 75 F. Supp. 543 (D. N.J. 1948).

[40]Beauregard v. Wingard, 230 F. Supp. 167 (S.D. Calif. 1964); Davis v. Johnson, 138 F. Supp. 572, 574 (N.D. Ill. 1955).

[41]*See* case cited note 18 *supra.*

[42]"If there is a clear duty to act at all, liability may be predicated quite as easily upon nonaction as upon action." W. PROSSER, TORTS § 126 at 1017 (3d 1964). But "it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *Id.* § 54 at 335.

[43]277 F. Supp. 872. *See also* Upchurch v. Clinton County, 330 S.W.2d 428, 431 (Ky. 1959); Batista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965); Zeppi v. Beach, 299 Cal. App. 2d 152, 40 Cal. Rptr. 183, 187 (1964).

[44]Comment, *Civil Actions For Damages Under the Federal Civil Rights Statutes,* 45 TEXAS L. REV. 1015, 1035 (1967).

[45]12 HOW. L.J. 285 (1966); *see also* Colley, *Civil Actions For Damages Arising Out of Violations of Civil Rights,* 17 HASTINGS L.J. 189 (1965); Shapo, *Constitutional Tort: Monroe v. Pape, And The Frontiers Beyond,* 60 NW. U.L. REV. 277 (1965); 39 N.Y.U.L. REV. 839 (1964).