Washington and Lee Law Review

Volume 22 | Issue 1 Article 11

Spring 3-1-1965

Punitive Damage Liability Of Municipal Corporations

but it will not assume the girl is naive simply because she is underage.[44] if the girl gives the appearance that she is over the age of consent and if the defendant had a reasonable bona fide belief that she was overage, the California court holds the accused is not guilty because a reasonable mistake of age will negate intent. This view is similar to that adopted by the Model Penal Code.[45]

The American courts have used two rationales to arrive at the result that a mistake as to the age of the female is no defense to the crime of statutory rape. The first rationale, strict liability, is not a proper approach because general intent is excluded as an element of the crime. The second view recognizes that general intent is necessary, but a mistake of age does not negate this intent. The necessary general intent is established by the fact that the defendant intended to do something wrong. While the second rationale is a proper approach, it is submitted that the results of this rationale should be reconsidered in those jurisdictions where fornication is not a crime and where the courts refuse to enforce moral and religious standards.

RUDOLPH BUMGARDNER, III

PUNITIVE DAMAGE LIABALITY OF MUNICIPAL CORPORATIONS

In most states municipal corporations are generally immune from tort liability. Even when these corporations are liable, either because the immunity has been abolished or the tort was committed in connection with a proprietary activity, damages are limited to those which are compensatory. Punitive damages cannot be recovered.

In a recent Florida case, *Fisher v. City of Miami*,[1] the plaintiff was arrested by a police officer of the defendant city. While making the

[44]"The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity." People v. Hernandez, 39 Cal. Rptr. 361, 362, 393 P.2d 673, 674 (1964).

[45]"Mistake as to Age. Whenever in this article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age." Model Penal Code § 213-6(1) (Proposed Official Draft, 1962).

[1]160 So. 2d 57 (Fla. Dist. Ct. App. 1964).

arrest the officer assaulted Fisher, who sued Miami for both compensatory and punitive damages. After striking the prayer for punitive damages, the lower court granted summary judgment for the defendant, stating that the city could not be held liable for the intentional torts of its agents. The District Court of Appeals reversed the summary judgment,[2] but affirmed the striking of the prayer for punitive damages. The court said that allowance of punitive damages against the city would serve no useful purpose. One judge dissented, contending that the propriety of granting punitive damages against a municipal corporation had been decided in the affirmative by the Florida Supreme Court.[3]

In 1788 the English Court of King's Bench decided *Russel v. Men of Devon*,[4] the case generally considered to have initiated the doctrine of municipal immunity from tort liability.[5] This case has been misapplied and misinterpreted by the courts.[6] As cities grew the attacks on the doctrine grew with them.[7] Yielding to the pressure for reform, some courts began holding that a city would be immune from liability only if it were engaged in a governmental function, as opposed to

---

[2]Simpson v. City of Miami, 155 So. 2d 829 (Fla. Dist. Ct. App. 1963), held that a municipal corporation could be liable for the intentional torts of its police officers, when in the scope of their employment. On this basis the court in the Fisher case held that the City of Miami could be liable for compensatory damages.

[3]In City of Miami v. McCorkle, 145 Fla. 109, 199 So. 575 (1941), the plaintiff sued the defendant for injuries sustained by the plaintiff when the City's fire truck struck the car in which McCorkle was a passenger. On the question of punitive damages the court said that when an employee of the municipality so negligently and carelessly operated the fire truck as to endanger the public then the municipality would be held to the same degree of liability as would an indivvidual under similar circumstances. It held that punitive damages would have been proper but that the jury verdict did not indicate that they had been assessed.

[4]2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

[5]Molitor v. Kaneland Community, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Borchard, Government Liability in Tort, 34 Yale L.J. 129 (1925).

[6]The Russel case was based on the theory that the King could do no wrong. Also the plaintiff was attempting to sue an unincorporated changing body of men. In papers which have still not been published the late Dean Roscoe Pound is said to have rebelled "against survival in our society of the idea that the king can do no wrong. We have no king...." Sutherland, One Man in His Time, 78 Harv. L. Rev. 7, 22 (1964). Today the corporation itself is amenable to suit.

[7]Lynwood v. Decatur Park Dist., 26 Ill. App. 2d 431, 168 N.E.2d 185 (1960); Erickson v. Fitzgerald, 342 Ill. App. 223, 96 N.E.2d 382 (1950); Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919); Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952); Harno, Tort Immunity of Municipal Corporations, 4 Ill. L.Q. 28 (1921).

a proprietary function, at the time the tort was committed.[8] While applying the governmental-proprietary function test, other courts expressed dissatisfaction with the whole immunity doctrine but declined to act, saying that such action must come from the legislature.[9] In *Hargrove v. Town of Cocoa Beach,*[10] the Florida court refused to pass the problem on to the legislature and abolished the doctrine. Other states followed the lead, and now the immunity doctrine has been abrogated or restricted by the courts or legislatures of a number of states[11] in addition to Florida.[12]

If a municipality can be sued, either because it no longer enjoys immunity or it was engaged in a proprietary function at the time the tort was committed, then the problem of punitive damages arises. A majority of the states do allow punitive damages against nongovernmental defendants.[13] These damages have been awarded for unusually

---

[8]Imperial Prod. Co. v. City of Sweetwater, 210 F.2d 917 (5th Cir. 1954); Day v. City of Berlin, 157 F.2d 323 (1st Cir. 1946); Splinter v. City of Nampa, 215 P.2d 999 (Idaho 1950); Gravander v. City of Chicago, 399 Ill. 381, 78 N.E.2d 304 (1948); Reierson v. City of Minneapolis, 118 N.W.2d 223 (Minn. 1962); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947).

[9]Lee V. Dunklee, 84 Ariz. 260, 326 P.2d 1117 (1958); Yonker v. City of San Gabriel, 23 Cal. App. 2d 556, 73 P.2d 623 (1937); Phillips v. State Highway Comm'n, 148 Kan. 702, 84 P.2d 927 (1939); Schuster v. City of New York, 207 Misc. 1102, 121 N.Y.S.2d 735 (Sup. Ct. 1953); Mason v. City of Cincinnati, 120 N.E.2d 740 (Ohio Ct. App. 1951); Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952) (concurring opinion).

[10]96 So. 2d 130 (Fla. 1957).

[11]City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Molitor v. Kaneland Community, supra note 5; Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); McCorkell v. City of Northfield, 123 N.W.2d 367 (Minn. 1963); Holytz v. City of Milwaukee, supra note 5; N.J. Stat. Ann. § 40:51:3 (Cum. Supp. 1963) (requires that the city purchase insurance to protect itself from tort suits growing out of some governmental functions); N.Y. Gen. Munic. Law § 50 (1954) (imposing liability on cities for torts committed while the city was engaged in some governmental functions such as the operation of motor vehicles.)

[12]The Florida case in which the immunity doctrine was abrogated involved negligent torts of city employees. The cases supra note 11 are valid precedents for negligent torts but the rationale applied in them would seem to apply equally to the field of intentional torts. In City of Miami Beach v. Nye, 156 So. 2d 205 (Fla. Dist. Ct. App. 1963), it was held that municipal liability would be applied to cases involving intentional torts.

[13]For a list of states accepting or rejecting the doctrine of punitive damages, see Oleck, Damages to Persons and Property, § 269 at p. 540 (rev. ed. 1962). Some states which recognize punitive damages allow them as multiple damages, and others as part of the compensatory damages. Still other states require that there be at least nominal damages before punitive damages will be permitted. The punitive damages are not awarded as a matter of right but in the discretion of the court.

oppressive conduct,[14] such as assault,[15] false imprisonment,[16] libel and slander,[17] nuisance,[18] and seduction.[19] In some cases in which punitive damages have been assessed against a private corporation, restrictions are applied to the assessment.[20] In others a simple rule of *respondeat superior* is applied.[21]

Almost without exception American jurisdictions still refuse to award punitive damages against municipal corporations.[22] An important reason is that to do so would contravene public policy.[23] Public money would be spent but the actual wrongdoer would not be punished. Another reason is the difficulty in determining the amount of

---

[14]"The 'rule of law' which is supposed to determine whether the case is an appropriate one for the allowance of punitive damages provides that they can be given only if it is found that the defendant has been 'reckless,' 'wanton,' 'oppressive,' 'wilful,' and the like." Morris, Punative Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1190 (1931).

[15]Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950); Vanneman v. W. T. Grant Co., 351 S.W.2d 729 (Mo. 1961); Trogden v. Terry, 172 N.C. 540, 90 S.E. 583 (1916); Bannister v. Mitchell, 127 Va. 578, 104 S.E. 800 (1920); Peck v. Bez, 129 W. Va. 247, 40 S.E.2d 1 (1946).

[16]Johnson v. Enlow, 286 P.2d 630 (Colo. 1955); Dennis v. Baltimore Transit Co., 189 Md. 610, 56 A.2d 813 (1948); Snyder v. State, 236 N.Y.S.2d 355 (Ct. Cl. 1963).

[17]Roden v. Empire Printing Co., 135 F. Supp. 665 (D. Alaska 1955); Edwards v. Hines, 85 F. Supp. 724 (D.D.C. 1948); Shumate v. Johnson Publishing Co., 293 P.2d 531 (Cal. Dist. Ct. App. 1956); Loftsgaarden v. Reeling, 126 N.W.2d 154 (Minn. 1964); Brooks v. MacBeth, 149 N.Y.S.2d 805 (Sup. Ct. 1956).

[18]McIvor v. Mercer-Fraser Co., 76 Cal. App. 2d 247, 172 P.2d 758 (1946); Southland Co. v. Aaron, 80 So. 2d 823 (Miss. 1955); Laurel Equip. Co. v. Matthews, 67 So. 2d 258 (Miss. 1953); Yazoo & M. Valley R.R. v. Saunders, 87 Miss. 607, 40 So. 163 (1906).

[19]Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917); Guadagno v. Folco, 62 R.I. 404, 6 A.2d 450 (1939); Caccamisi v. Thurmond, 282 S.W.2d 633 (Tenn. Ct. App. 1955); Bishop v. Webster, 154 Va. 771, 153 S.E. 832 (1930).

[20]Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101 (1893) (holding that the acts of the employee must have been authorized or ratified by the employer); Western Union Tel. Co. v. Aldridge, 66 F.2d 26 (9th Cir. 1933) (holding that the employer must have been negligent in the hiring of the employee or have known that he was incompetent); Cleghorn v. New York Central & H.R.R., 56 N.Y. 44 (1874) (holding that the employer must have known that the employee was unfit for the position); Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S.E. 829 (1928) (allowing punitive damages on a showing that the employer did ratify the acts of the employee).

[21]Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); American Fid. & Cas. Co. v. Farmer, 77 Ga. App. 166, 48 S.E.2d 122 (1948); Hayes v. Southern Ry., 141 N.C. 195, 53 S.E. 847 (1906); Beauchamp v. Winnsboro Granite Corp., 113 S.C. 522, 101 S.E. 856 (1920).

[22]For cases so holding see Annot., 19 A.L.R.2d 903, 908 (1951). This majority includes states which still maintain the immunity doctrine and those which have abolished it.

[23]Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Board of Comm'rs v. Baxter, 113 Okla. 280, 241 Pac. 752 (1925).

damages to be assessed. The jury may look to the wealth of the defendant in determining the proper amount of punitive damages,[24] and courts fear that the jury, looking to the wealth of municipalities, will return enormous verdicts of punitive damages.[25] Still another rationale is that, if punitive damages are to be permitted against the municipalities, the authority for such action must come from the legislature.[26]

Notwithstanding the majority view to the contrary, a few courts have either actually or impliedly authorized the assessment of punitive damages against municipal corporations. The courts in these cases did not concern themselves with municipal immunity, apparently assuming that the cities were engaged in proprietary functions and thus liable for their actions. Most of the cases have involved the operation of water and sewage systems. In *Kelly v. City of Cape Girardeau*,[27] the defendant was held liable for both compensatory and punitive damages. A judgment had been rendered declaring that the overflow of the gutters maintained by the city was a nuisance. The action of the city was described as "the intentional creation of a condition by appellant... declared to be a nuisance, and the intentional continuance of that nuisance to the respondent's injury without legal justification."[28] The court said that such action was "malice at law" and it justified the award of punitive damages. A similar case which implied that punitive damages could be assessed against a city was *City of Covington v. Faulhaber*.[29] The plaintiff sued the city after

---

[24]A recognized principle of law is that the jury may receive evidence as to the wealth of the defendant in order to assess proper punitive damages. The principle is based on the theory that an amount sufficient to punish a poor man might have little or no effect on a wealthy man or corporation. Maiborne v. Kuntz, 56 So. 2d 720 (Fla. 1952).

[25]"The danger... of immoderate verdicts, is certainly a real one, and the criterion to be applied by the judge in setting aside or reducing the amount is concededly a vague and subjective one. Nevertheless the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds,... and it must be a rare instance when an unjustifiable award escapes correction." McCormick, Damages § 77 at p. 278 (1935). In the recent libel case of Butts v. Curtis Publishing Co., 225 F. Supp. 916 (N.D. Ga. 1964), the trial judge reduced the punitive damages by well over two million dollars. Such a practice of reducing excessive punitive damages has been upheld. Virginian Ry. v. Armentrout, 166 F.2d 400 (4th Cir. 1948), holding that the judge had the right and the duty to either reduce or set aside an excessive verdict.

[26]Desforge v. City of West St. Paul, 231 Minn. 205, 42 N.W.2d 633 (1950); Rascoe v. Town of Farmington, 62 N.M. 51, 304 P.2d 575 (1956); Clark v. City of Greer, 98 S.E.2d 751 (S.C. 1957). The attitude of leaving the action to the legislature is similar to that held by some courts in refusing to abrogate the tort immunity doctrine.

[27]89 S.W.2d 41 (Mo. 1935).

[28]Id. at 45.

[29]178 Ky. 586, 199 S.W. 32 (1917).

its reservoir overflowed, damaging the plaintiff's property. It appeared that the city had been negligent in failing to clean the reservoir regularly. By its negligence a nuisance was created. The court said that wanton and malicious conduct on the part of the defendant had to be shown before plaintiff could recover punitive damages. The plaintiff could only show negligent conduct on the part of the city, so punitive damages were not allowed.

In *Willett v. City of St. Albans*,[30] a sewer operated by the defendant overflowed onto the plaintiff's property. The court held that the defendant could not be held liable for punitive damages under the facts of this case. It said that, in order to recover punitive damages, the plaintiff must show that the actions causing the overflow were ordered or ratified by the trustees of the village. In the absence of such a showing by the plaintiff no punitive damages were allowed. In *City of Lawton v. Johnstone*,[31] the defendant's sewerage damaged the plaintiff's property. The plaintiff recovered compensatory and punitive damages in the lower court. The Supreme Court said that the officers of the city were the wrongdoers and the agents of the people. Using an agency approach, the people as principals could be held liable to the same degree as their agents. The court noted that the city had not had time to correct the defect, so punitive damages would not yet be appropriate. By way of dictum the court said that, if another case arose against the city for the operation of the sewers, then punitive damages might be appropriate.

In *Armstrong & Latta v. City of Philadelphia*,[32] the plaintiffs sued the city in replevin for some equipment belonging to the plaintiffs and retained by the defendant, the city officers believing that it belonged to another contractor. In discussing the damages which could be awarded the court said: "Exemplary damages may also be allowed in cases where there have been particular circumstances of fraud, oppression, or wrong in the taking or the detention of the property."[33] After so stating, the court concluded that no such circumstances had been presented by the plaintiff and exemplary damages would not lie.

As courts look with more favor on the recovery of compensatory damages against municipalities, the question will arise as to whether they should go further and allow punitive damages. Admittedly a municipal corporation is different from a private corporation in its

[30]69 Vt. 330, 38 Atl. 72 (1897).
[31]132 Okla. 145, 252 Pac. 393 (1926).
[32]249 Pa. 29, 94 Atl. 455 (1915).
[33]Id. at 457.