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TORT LIABILITY OF COUNTIES

Ever since 1889 when the Supreme Court of Appeals handed down its decision in the case of *Fry v. County of Albemarle*,[1] Virginia has adhered strictly to the doctrine that counties, as political subdivisions of the state, are totally immune from tort liability. As a result a county in Virginia cannot be sued unless it is so provided by statute, and this principle remains firm and unquestioned in Virginia's courts under the doctrine of stare decisis.[2]

This Virginia view was reiterated in *Mann v. County Board of Arlington County*.[3] The plaintiff was injured through the negligence of the county in the maintenance and operation of its sidewalks. Prior to the accident, Arlington County had elected to withdraw from the provisions of a statute which would have placed its streets under the state's secondary system of highways.[4] Therefore, the county was solely responsible for supervision of the sidewalk area when the plaintiff was injured. The plaintiff contended that Arlington County should be liable for its negligence on the same basis as a municipal corporation. In support of this contention it was argued that Arlington County has many of the characteristics of a municipal corporation, and, hence, the tort liability law regarding municipalities in Virginia should be applied.[5] The court rejected the plaintiff's

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[1]86 Va. 195, 9 S.E. 1004 (1889).

[2]The West Point, 71 F. Supp. 206 (E.D. Va. 1947); Parker v. Prince William County, 198 Va. 231, 93 S.E.2d 136 (1956); Nelson County v. Coleman, 126 Va. 275, 101 S.E. 413 (1919); Nelson County v. Loving, 126 Va. 283, 101 S.E. 406 (1919); 5 Michie's Jur., Counties § 84 (1949).

[3]199 Va. 169, 98 S.E.2d 515 (1957).

[4]The Secondary Road Law, enacted by the General Assembly in 1932, incorporated all secondary roads into the State Highway System. Va. Acts 1932, c. 415. The law provided, however, that the qualified voters of a county could withdraw from the operation of the act and have the county secondary road system remain a local function. Id. § 11. At the present time only Arlington and Henrico counties are electing to maintain their own secondary road systems. Virginia State Chamber of Commerce, Virginia's Government 101 (1955).

[5]Whether or not the plaintiff could have recovered, had his contention that Virginia municipal tort law should govern been accepted, seems to be the subject of sharp judicial conflict. Decisions have turned on the seriousness of the street or sidewalk defect with little or no mention of the governmental-proprietary distinction. The Virginia court assumes that the function is proprietary, stating that cities have a duty of reasonable care to see that their streets and highways are kept in a safe condition. Cases imposing liability upon cities for defective streets and sidewalks include Buck v. Danville, 177 Va. 582, 15 S.E.2d 31 (1941); Norfolk v. Hall, 175 Va. 545, 9 S.E.2d 356 (1940); Danville v. Sallie, 146 Va. 349, 131 S.E. 788 (1926); Richmond v. Rose, 127 Va. 772, 102 S.E. 561 (1920). Cities have been held not liable in Richmond v. McDonald, 183 Va. 694, 33 S.E.2d 186 (1945); Staunton

contention, stating that the rule of county immunity is well settled in Virginia.[6]

It is firmly established that a municipal corporation may be liable for negligence in the performance of proprietary or non-governmental functions,[7] and this rule has been fully accepted in Virginia.[8] However, decisions in Virginia have denied recovery against a city unless the function involved was unquestionably proprietary. Recovery has not been allowed, for example, in the fields of police protection,[9] garbage removal,[10] fire protection,[11] and licensing.[12] In restricting the scope of municipal liability, the judiciary appears to be in accord with the viewpoint of the legislature. When damages were allowed in *Hoggard v. City of Richmond*[13] for an injury resulting from the negligent maintenance of a swimming pool, the General Assembly enacted a statute whereby cities may be held liable only for gross negligence in the operation of parks and swimming pools.[14]

The principal case is in accord with the general and prevailing view in this country on the tort liability of quasi-municipal corporations such as counties and towns. These units are usually considered immune from tort liability regardless of the type of function that is

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v. Kerr, 160 Va. 420, 168 S.E. 326 (1933); Roanoke v. Sutherland, 159 Va. 749, 167 S.E. 243 (1933); Clark v. Richmond, 83 Va. 355, 5 S.E. 369 (1887). See Note, 19 Va. L. Rev. 748 (1933). At least one recent decision has held that the city must have notice of the defect before it can be held liable. West v. Portsmouth, 196 Va. 510, 84 S.E.2d 503 (1954).

[6]Arlington County carried liability insurance which would have paid any judgment awarded and because of this coverage withdrew its original demurrer pleading governmental immunity. The court ruled that the immunity was inherent and could not be waived. For discussion see Bell, Municipal Corporations, Annual Survey of Va. Law, 43 Va. L. Rev. 968, 972 (1957).

[7]Bertiz v. Los Angeles, 74 Cal. App. 792, 241 Pac. 921 (1925); Denver v. Deane, 10 Colo. 375, 16 Pac. 30 (1887); Staunton v. Detroit, 329 Mich. 516, 46 N.W.2d 569 (1951); City of Jackson v. McFadden, 181 Miss. 1, 177 So. 755 (1937); City of Houston v. Schilling, 150 Tex. 387, 240 S.W.2d 1010 (1951); Warden v. City of Grafton, 99 W. Va. 249, 128 S.E. 375 (1925); Harper, Torts § 295 (1933).

[8]Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939); Richmond v. James, 170 Va. 553, 197 S.E. 416 (1938); Portsmouth v. Madrey, 168 Va. 517, 191 S.E. 595 (1937); Danville v. Howard, 156 Va. 32, 157 S.E. 733 (1931); Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927); 13 Michie's Jur., Municipal Corporations § 102 (1951).

[9]Harman v. Lynchburg, 74 Va. (33 Gratt.) *37 (1880).

[10]Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223 (1929).

[11]Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927) (dictum).

[12]Terry v. Richmond, 94 Va. 537, 27 S.E. 429 (1897).

[13]172 Va. 145, 200 S.E. 610 (1939).

[14]Va. Code Ann. § 15-714 (Repl. Vol. 1956).

negligently performed.[15] As early as 1929 this rule was changed in Pennsylvania by *Bell v. City of Pittsburgh*.[16] Allegheny County, a co-defendant, was held liable for injuries resulting from the negligent operation of an elevator. In 1956 a federal court, in applying the law of Pennsylvania, followed the decision of the *Bell* case,[17] and it is now apparently settled in that state that a county may be held liable for its torts.[18]

The Pennsylvania rule seems to have been adopted by the Supreme Court of North Carolina. In *Rhodes v. City of Asheville*[19] an action was brought for the negligent operation of an airport. Henderson County was one of three co-defendants, having acted jointly with two municipalities in the construction and maintenance of the airport. In holding the county liable the court said: "Ordinarily a county does not undertake to perform functions except in a governmental capacity. But when it undertakes, with legislative sanction, to perform an activity which is proprietary or corporate in character, such a county may be liable in tort to the same extent as a city or town would be if engaged in the same activity."[20] Virginia has a statute, similar to that of North Carolina, authorizing cities and counties jointly to build and operate airports.[21] As yet, there has been reported in Virginia no case involving an act negligently performed by a city and county in a joint undertaking.

It is important to point out that Virginia cities are independent entities entirely separate from the counties in which they are located. This is true of only two other cities in the United States, Baltimore and St. Louis.[22] By virtue of this unique organization Virginia's coun-

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[15]Snethen v. Harrison County, 172 Iowa 81, 152 N.W. 12 (1915); Board of County Com'rs of Shawnee County v. Jacobs, 79 Kan. 76, 99 Pac. 817 (1908); Downing v. Mason County, 87 Ky. 208, 8 S.W. 264 (1888); Hughes v. Monroe County, 147 N.Y. 49, 41 N.E. 407 (1895); 14 Am. Jur., Counties § 48 (1938). The apparent reason for this is that a county is an involuntary corporation created by the state. It cannot be separated from the state and, therefore, always possesses the inherent immunity of its creator. Query, when the county engages in a voluntary undertaking?

[16]297 Pa. 185, 146 Atl. 567 (1929).

[17]Daniels v. County of Allegheny, 145 F. Supp. 358 (W.D. Pa. 1956).

[18]"No Pennsylvania decision . . . exonerates a county from tort liability when engaged in a proprietary function. . . . Neither in that case [Hartness v. Allegheny County, 349 Pa. 248, 37 A.2d 18 (1944)] nor in any case cited is the county excused from liability for torts solely because it is an arm of the state government." Daniels v. County of Allegheny, 145 F. Supp. 358, 361 (W.D. Pa. 1956).

[19]230 N.C. 134, 52 S.E.2d 371 (1949), rehearing denied, 53 S.E.2d 313 (1949).

[20]52 S.E.2d at 376.

[21]Va. Code Ann. § 5-29 (1950).

[22]Eubank, Virginia's Towns and Cities, The Commonwealth, Dec. 1948, p. 21 at 23. This article also gives a good discussion of Virginia's cities, their foundation, and unique political status.

ties and cities are equal in the state's governmental hierarchy. Historically, the basic difference between a city and county is that a city derives its authority from a charter while county authority stems from the statutes of the particular state. This distinction is recognized throughout the United States and, in this respect, Virginia's organization does not differ from that of any other state.[23] Primarily, counties are created to govern rural areas while municipalities are chartered to govern urban areas and to provide the special services they require. Today it hardly seems appropriate to call Arlington County a rural area. As a county it performs for its citizens and for the state all those functions which are usually associated with counties; in addition, it must perform many functions which are peculiar to municipalities.

Virginia, because of the unique organization of its political subdivisions, has more reason than other states to follow the modern trend that is being developed in Pennsylvania and North Carolina. Such a policy would be logical and consistent with the political organization of the state. Metropolitan counties such as Arlington are bound to engage in a great variety of non-governmental functions. More and more they will act and behave like cities, and the courts should recognize this. It is unrealistic to hold to a law that allows an individual injured through the negligence of a city-operated park to recover full compensation, and denies recovery to an individual injured through the negligence of a county-operated park.

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[23]But note that both are subject to code provisions and other legislative enactments. A chartered city usually has a certain amount of independence, but this varies widely from state to state. A county, on the other hand, is almost entirely at the mercy of the legislature.