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MUNICIPAL CORPORATIONS

FELLOW SERVANT RULE NOT A VALID DEFENSE TO LIABILITY OF CITY FOR NEGLIGENCE OF ITS EMPLOYEE IN OPERATING A MUNICIPAL VEHICLE

Plaintiff, a police officer, sued the city of New York for injuries sustained while riding as a "recorder" in a radio patrol car driven by a fellow officer. Plaintiff's injuries were caused by the negligence of the officer with whom he was riding and, accordingly, the city contended that the fellow servant rule applied. The trial court found for the plaintiff, rejecting the city's contention. The Appellate Division reversed, holding that the fellow servant rule precludes recovery by the plaintiff (two dissenting justices would not have applied the fellow servant rule). The Court of Appeals *held*, reversed. Sections 50-a and 50-b of the General Municipal Law not only make the city liable for the negligent operation of vehicles by police and other municipal officers, but also in this case create a disparity in rank between the two policemen thereby excluding the fellow servant rule as a defense in this situation. *Poniatowski v. City of New York*, 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964).

In 1929 the state of New York waived sovereign immunity from liability and suits.¹ Because the subdivisions of the state derived their own immunity solely from the latter, they, too, lost it and may be sued in the same manner as individuals and corporations.² The effect of the waiver of immunity on municipal corporations depends upon the functional characteristics of the city as related to the particular incident.³ At common law cities have a dual character. They are, first, corporations performing strictly proprietary or municipal functions which benefit only the city itself and its citizens. Cities have always been liable for injury resulting from negligence in performing these functions.⁴

1. N.Y. Ct. of Claims Act, § 8. "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workman's compensation law." See *McCrosen v. State*, 277 App. Div. 1160, 101 N.Y.S.2d 591 (4th Dep't 1951) " . . . section 8 of the Court of Claims Act not only waived the State's immunity to suit and liability, but also made applicable the rule of *respondent superior* to all officers, servants, agents and employees of the State, . . ."

2. *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947) (against city without separate statute); *Bloom v. Jewish Bd. of Guardians*, 286 N.Y. 349, 36 N.E.2d 617 (1941) (against charitable agency of the state); *Holmes v. Erie County*, 266 App. Div. 220, 42 N.Y.S.2d 243 (4th Dep't 1944), *aff'd*, 291 N.Y. 798, 53 N.E.2d 369: "The waiver of sovereign immunity by section 8 of the Court of Claims Act included the civil divisions of the State and made them answerable for the wrongful acts of their officers and employees. . . . Thus, the doctrine of *respondent superior* . . . is now applicable with respect to municipal officers and employees." *Collins v. City of New York*, 11 Misc. 2d 76, 77-78, 171 N.Y.S.2d 710, 712 (Sup. Ct. 1958), *aff'd*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't 1959), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959); *Shaw v. Village of Hempstead*, 15 Misc. 2d 72, 177 N.Y.S.2d 744 (Sup. Ct. 1958), *modified*, 11 A.D.2d 789, 214 N.Y.S.2d 945 (2d Dep't 1960).

3. See generally 62 C.J.S. *Municipal Corporations* §§ 110-116 (1949). 2 Anticau, *Municipal Corporation Law* § 11.07 (1963) (governmental versus proprietary); 4 Dillon, *Municipal Corporations* §§ 1655-1670 (5th ed. 1911).

4. *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1941); *Layer v. City*

RECENT CASES

Second, cities perform governmental or public duties placed upon them by the state which benefit the state as a whole rather than the city in particular.⁵ Historically cities have been immune from liability for injuries resulting from negligence in the performance of the latter duties under the theory that the cities were acting as "agents" of the state.⁶ The present action would not lie at common law because both state and city were immune. Concurrently with the waiver of immunity, the state enacted a statute which makes cities liable for the negligence of a duly appointed person when driving a municipal vehicle although he was performing a public duty.⁷ At common law, and generally today, policemen are considered to be performing a governmental rather than a proprietary function, and as such are not servants of the city.⁸ This statute therefore changes the governmental status of the policeman-driver *pro tanto* to that of a municipal servant.⁹ Hence the city must answer for his negligence not only under the common law rule of *respondeat superior* applicable to the city by section 8 of the New York Court of Claims Act, but also under this statute. The statute is silent on the further question of whether or not a defense based on the fellow servant doctrine is available to a municipality. The city contended that this defense is available because the statute failed to preclude it expressly.

of Buffalo, 274 N.Y. 135, 8 N.E.2d 307 (1937); *Maxmillian v. Mayor of New York*, 62 N.Y. 160, 20 Am. Rep. 468 (1875); *Bailey v. Mayor of New York*, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

5. The distinction between proprietary and governmental functions rests on the facts of the particular case. Generally, however, if the city is under statutory mandate to perform a duty which is primarily for the benefit of the state, the city is said to be acting as an agent of the state and is performing a governmental function. The police power is usually a governmental function. *Wilcox v. City of Rochester*, 190 N.Y. 137, 82 N.E.2d 1119 (1907). On the other hand if the city is performing a function primarily for its own benefit which is not required by statutory mandate, courts generally hold it is acting in its proprietary capacity. Water supply is commonly held to be a proprietary function. *Layer v. City of Buffalo*, 274 N.Y. 135, 8 N.E.2d 307 (1937). What appears to be the first enunciation of the governmental versus proprietary test is found in *Bailey v. Mayor of New York*, 3 Hill 531, 539, 38 Am. Dec. 669 (1842) ("object or purpose" test).

6. *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Evans v. Berry*, 262 N.Y. 61, 186 N.E.2d 203 (1933); *Murtha v. New York Homeopathic Medical College*, 228 N.Y. 183, 126 N.E.2d 722 (1920); *Maxmillian v. Mayor of New York*, 62 N.Y. 160, 20 Am. Rep. 468 (1875); see also 4 Dillon, *Municipal Corporations* § 1656 (5th ed. 1911) (relative to police).

7. N.Y. Munic. Law § 50-a. The statute reads in part as follows: "Every city . . . shall be liable for the negligence of a person duly appointed . . . to operate a municipally owned vehicle within the state in the discharge of a statutory duty imposed upon the municipality, provided the appointee at the time of the accident or injury was acting in the discharge of his duties and within the scope of his employment. Every such appointee shall, for the purpose of this section, be deemed an employee of the municipality. . . ." In 1936, what is now section 50-b, was added to the N.Y. Munic. Law. This section renders the city liable and makes it "assume the liability for the negligence of, and . . . save harmless . . ." such persons as are described in section 50-a.

8. *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Evans v. Berry*, 262 N.Y. 61, 67-68, 186 N.E. 203, 204-05 (1933); *Miller v. City of Albany*, 158 Misc. 720, 287 N.Y. Supp. 889 (Sup. Ct. 1935), *aff'd*, 247 App. Div. 848, 286 N.Y. Supp. 326 (3d Dep't 1936); see generally 62 C.J.S. *Municipal Corporations* § 568 (1949). *But cf.* *Albany v. Standard Acc. Ins. Co.*, 7 N.Y.2d 422, 165 N.E.2d 869, 198 N.Y.S.2d 303 (1960) (police are servants, but only for the purpose of reading a contract of insurance).

9. The crucial phrase of the statute as it affects the instant case is: "such appointee shall, for the purpose of this section, be deemed an employee of the municipality. . . ."

The fellow servant rule remains one of the three common law defenses against employer's liability.¹⁰ The rule insulates the employer from liability for the injuries to one employee caused by the negligence of another employee.¹¹ Its original purposes, as enunciated in the three cases where it is first found,¹² were stated to be the promotion of safety among employees, and assistance to growing industry by limiting the liabilities of employers. The rationale used by the courts to justify these ends have emphasized certain elements of the master-servant relationship: among them the assumptions that (1) the master has already satisfied his obligation of ordinary care by employing competent servants, (2) if the master's liability is not expressed or implied in the contract, it does not exist, (3) the servant has, by accepting the employment, acted in a manner akin to assumption of the risk, and (4) servants are in a better position than the master to know of the actions of their fellow servants, and can therefore more easily insure their own safety. Whatever assumptions may originally have underlain the rule, experience has shown that the inequities it produces outweigh the benefits supposedly anticipated. Consequently the scope of this defense was severely curtailed by legislators who either abrogated it completely or narrowly confined it.¹³ The courts however have almost invariably, though frequently with ringing professions of distaste, upheld the fellow servant rule where it has not been eliminated by statute.¹⁴

The majority seeks to answer the problem presented by holding section 50-a of the General Municipal Law (making cities liable for the negligence of a person driving a municipal vehicle) and section 50-b (making cities assume the liability of such drivers) applicable. These two sections make the driver of a vehicle a "servant" but *only for the purposes of the sections involved*, while remaining silent about the passenger's status. The Court assumes that the common law status of policemen has remained unchanged, that is, they are still deemed to be agents performing a governmental function. The majority implies that since the driver in this situation is an *employee* and the passenger

10. The three defenses are: 1) assumption of risk, 2) contributory negligence, 3) fellow servant rule. See Prosser, Torts § 68 (2d ed. 1955).

11. See generally *ibid.* See 4 LaBatt, Master and Servant § 1393 (2d ed. 1913) for detailed history and analysis of the fellow servant rule.

12. *Priestly v. Fowler*, 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837) (first enunciation); *Murray v. South Carolina R.R.*, 11 (1 McMul.) S.C. 385, 36 Am. Dec. 268 (1841) (the court said that because the company did not specifically ask the co-employee to break the other's leg it could not possibly be liable); *Farwell v. Boston and Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49, 38 Am. Dec. 339 (1842) (holding that because there was a contract of employment that did not purport to hold the employer liable for injuries at the hands of a co-employee, and because the employee is compensated by his wage for the risk he assumes, the employer should not be liable for the injuries).

13. Workman's Compensation statutes and the Federal Employer's Liability Act completely abrogate the rule. Arizona (Ariz. Const. art. 18, § 4), Colorado (Colo. Rev. Stat. Ann. 80-6-1 (1953)), and Wisconsin (Wisc. Stat. Ann. 331.37 (1958)) have eliminated it by statute. Arkansas (Ark. Stat. Ann. 81-1201, 81-1209 (1947)) denies the defense to corporations and coal mining operators, as do many other states which have severely limited it.

14. See *Crenshaw Bros. Produce Co. v. Harper*, 142 Fla. 27, 47-49, 194 So. 353, 361-63 (1940) for history and arguments against the rule. Prosser, Torts §§ 68, 69 (2d ed. 1955); 4 LaBatt, Master and Servant § 1397 (2d ed. 1913).

an *agent* this disparity of status eliminates the validity of the city's defense of the fellow servant rule.¹⁵ The dissent, however, raises the interesting problem (which the majority assumes to be solved) of the status of policemen: are they employees or agents? Judge Van Voorhis, quoting at length from one of his earlier opinions,¹⁶ claims that city police are servants because of the fact that cities have been held liable for injury to third persons due to the negligence of city policemen. Therefore, being servants, they also are fellow servants and the fellow servant rule should be available here as a defense.

In the light of modern views concerning the employer-employee relationship, and especially in view of the developments in the field of workmen's compensation, the majority holding is more responsive to current trends of our thinking. It shifts the cost of injury from the injured employee to the employer who can more adequately pass it on. Although the majority arrives at what appears to be an equitable conclusion, it would seem that they could have reached it by more persuasive reasoning. First, a clearer showing that policemen are ordinarily agents performing a governmental function,¹⁷ especially in light of the dissent's argument, would have made its position considerably stronger. This would have involved some discussion of why cities have been held liable for policemen's torts. The dissent states that it is because they are now servants of the city. But it would appear from an examination of the cases and texts that the cities have been held liable not because of a change in the policemen's status from agent to servant, but as a consequence of the state's waiver of immunity.¹⁸ Instead of following the judicial pattern of the last seventy-five years by creating one more minute exception to the fellow servant rule,¹⁹ the court could have taken a more forceful approach by observing that the fellow servant rule is a relatively recent (1837) judicial creature and that it is clearly within the power if not the responsibility of the judiciary to elimi-

15. The majority reasons to the ultimate implication solely in the following three sentences. "There is no reason for not extending the relief thus afforded private persons to the police driver's fellow officers as well. Had the Legislature intended to exclude them from the statute's coverage, it could easily have so provided. It chose, instead, to denominate as an employee of the municipality solely the person operating the vehicle 'in the discharge of a statutory duty.'" Instant case at 80, 198 N.E.2d at 238, 248 N.Y.S.2d at 851.

16. *Schuster v. City of New York*, 5 N.Y.2d 75, 81-82, 154 N.E.2d 534, 537-38, 180 N.Y.S.2d 265 (1958).

17. See authorities cited note 8 *supra*.

18. 2 Antieau, *Municipal Corporation Law* § 12.05 (1963) (commenting on the effect of the New York Court of Claims Act); see also *McCrink v. New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947); *Collins v. City of New York*, 11 Misc. 2d 76, 77-78, 171 N.Y.S.2d 710, 712 (Sup. Ct. 1958), *aff'd*, 8 A.D.2d 613, 185 N.Y.S.2d 740 (1st Dep't 1959), *aff'd*, 7 N.Y.2d 822, 164 N.E.2d 719, 196 N.Y.S.2d 700 (1959); *Miller v. City of Albany*, 158 Misc. 720, 287 N.Y. Supp. 889 (Sup. Ct. 1935), *aff'd*, 247 App. Div. 848, 286 N.Y. Supp. 326 (3d Dep't 1936). See particularly, *Koeppe v. City of Hudson*, 276 App. Div. 443, 95 N.Y.S.2d 700 (3d Dep't 1950) (and cases cited therein); *Berean v. Town of Lloyd*, 5 A.D.2d 924, 172 N.Y.S.2d 301 (3d Dep't 1958); *McCrosen v. State*, 277 App. Div. 1160, 101 N.Y.S.2d 591 (4th Dep't 1951).

19. Courts in the past have limited the doctrine in many ways to avoid its application. Such limits are discussed in 4 LaBatt, *Master and Servant* §§ 1395-1405 (2d ed. 1913). They include such exceptions as vice-principalship, master's negligence, and separate departments.

nate it.²⁰ Finally, and more narrowly, it could have pointed to the novel scheme adopted by the legislation involved. It goes beyond the common law doctrine of *respondeat superior* by freeing the tort-feasor altogether while shifting liability solely to the employer. It is hard to conceive that a legislature, in enacting legislation designed to free policemen from tort liability, also intended that the fellow servant rule would be available as a defense against a member of the very group whose financial welfare was to be advanced. These two grounds would have provided the court with the opportunity to abolish this rule which both majority and dissent decry as being antiquated, wicked, callous to human rights and inherently and grossly unjust.

MICHAEL SWART

NEGLIGENCE

COMPLAINT ALLEGING MOTHER'S MENTAL DISTRESS WITH PHYSICAL MANIFESTATIONS CAUSED BY WITNESSING DEATH OF HER SON BY ALLEGED NEGLIGENCE OF DEFENDANT HELD TO STATE A CAUSE OF ACTION.

While crossing a highway, plaintiff's son was struck and instantly killed by defendant, who was negligently driving her husband's automobile. Plaintiff, who had been standing by the side of the road watching her son cross, sued for personal injuries, alleging severe mental distress with physical manifestations, occasioned by witnessing his death. Defendant moved to dismiss the complaint for failure to state a cause of action. *Held*, motion denied. A pleading of negligent infliction of severe mental distress with physical manifestations, by a mother who was present and saw her son killed by defendant's negligence, states a cause of action, even though she herself was not placed in danger by defendant's act. *Haight v. McEwen*, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964).

Tort liability for the infliction of mental distress has passed through relatively well-defined stages of development.¹ It was first treated as an element of "parasitic" damages—that is, invasion of the plaintiff's "interest in mental tranquillity"² could be considered in the determination of damages, but not in the determination of liability.³ Subsequently a duty was imposed on those engaged in a "common calling" to refrain from unreasonably invading the right. Thus liability for the infliction of mental distress was ex-

20 See Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1961).

1. For an extensive treatment of this development see Amdursky, *The Interest in Mental Tranquillity*, 13 Buffalo L. Rev. 339 (1964), in which the intentional invasion of this interest is treated as antedating the imposition of liability to those engaged in a common calling.

2. *Ibid.*

3. 1 Street, *Foundations of Legal Liability* 461 (1906).