MUNICIPAL IMMUNITY IN THE MAINTENANCE AND OPERATION OF A MUNICIPAL AIRPORT

INTRODUCTION

The doctrine of municipal immunity from liability for acts of municipal officers and agents in the discharge of governmental functions has its roots in the ancient common law concept that "the king can do no wrong."[1] Accordingly, a municipality, exercising limited powers delegated to it by the state, has been held immune from liability for the governmental acts of its officers and agents;[2] and in the operation and maintenance of an airport, a municipality has been granted the benefit of the doctrine.[3] However, dissatisfaction with the doctrine of municipal immunity soon caused some courts to make a distinction[4] between governmental functions and proprietary functions. Consequently, municipalities have been held liable for torts[5] where, in the operation and maintenance of an airport, the municipality's activities are deemed to be of a proprietary nature.[6]

The purpose of this Note is to survey the theories used in those jurisdictions which have dealt with municipal immunity in the operation of an airport, and to provide an analysis of the current status of the Iowa law dealing with municipal liability in airport operation.

I. THE CLASSICAL APPROACH

A. *Municipal Immunity Granted*

Municipal immunity from liability in tort has been traditionally supported by the theory that in the maintenance and operation of a municipal airport, the city is performing a governmental function, with respect to which it may be immune from tort liability.[7] Ordinarily, a finding of municipal immunity in the operation of its airport is the result of a state legislative pronouncement that the nature of the function is governmental, as opposed to proprietary.[8] Never-

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1 Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933).

2 Krantz v. City of Hutchinson, 165 Kan. 449, 196 P.2d 227 (1948).

3 Van Gilder v. City of Morgantown, 136 W. Va. 831, 68 S.E.2d 746 (1949).

4 The clarity of the distinction is somewhat vague since different courts consider different factors in determining the nature of the function. A distinction which is as representative as possible of the various jurisdictions states: A function is governmental if the activity is for the advantages of the state as a whole or is in the performance of a duty imposed by sovereign power. Department of Treasury v. Michigan City, 223 Ind. 435, 60 N.E.2d 947 (1945). A function is said to be proprietary if the activity is commercial or chiefly for the advantage of the compact community. Clark v. Scheld, 253 N.C. 732, 117 S.E.2d 838 (1961).

5 Brasier v. R.F. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958).

6 Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947).

7 Barovich v. Miles City, 135 Mont. 394, 340 P.2d 819 (1959).

8 Kirksey v. City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957); City of Corsicana v. Wren, 159 Tex. 202, 317 S.W.2d 516 (1958).

theless, although the legislatures have provided the main impetus toward the denial of liability, it cannot be categorically stated that the legislative bodies have barred recovery per se. Rather, the final statement of liability has usually been left to the courts. In the cases upholding immunity on the basis of statutes defining the function as governmental, the courts have construed the statutory language to deny liability.[9] These courts yield to what has been considered the legislative intent to immunize the municipality in connection with airport maintenance and operation.[10]

State legislative enactments in rare instances have specifically exempted the municipality from liability.[11] These statutes provide that the construction, maintenance, and operation of municipal airports are public and governmental functions, and, most importantly, declare that no action can be brought against any municipality in connection with the construction, maintenance, and operation of any municipal airport.[12] As a result, the courts in dealing with such pronouncements need not deliberate in determining the legislative intent as to the extent of liability since the direct state statutory declaration is controlling.[13]

In light of the decisions granting immunity to a municipality in the maintenance and operation of a municipal airport, it is apparent these courts fear that liability cannot be applied without creating the possibilities for frivolous and spurious suits. Cognizant of this, courts have denied recovery on the basis of statutes defining the function as governmental, and legislatures in certain isolated instances have considered it necessary to avoid liability by a specific declaration to that effect.

B. *Municipal Immunity Denied*

In the absence of a statute indicating an intention to exempt a municipality from liability, the prevailing view is that the maintenance and operation of an airport by a municipality constitutes an exercise of a proprietary function, thereby exposing the municipality to tort liability.[14] Tort immunity has been consistently denied to municipal governments performing "proprietary" or commercial functions.[15] However, no single criterion exists upon which the courts have relied in determining that the function is proprietary in nature.

Some courts look to the individual circumstances of each case in deciding whether a particular municipal airport operation can be classified as a proprie-

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[9] The courts, which have denied recovery against municipalities on the basis of statutes defining the function as governmental, have interpreted such statutes to be negative pronouncements by the legislatures, indicating that it is the wish of the legislatures to grant immunity to the municipality with respect to airport operation.

[10] City of Corsicana v. Wren, 159 Tex. 202, 317 S.W.2d 516 (1958).

[11] TENN. CODE ANN. § 42-326 (1964).

[12] *Id.*

[13] Stocker v. City of Nashville, 174 Tenn. 483, 126 S.W.2d 339 (1939).

[14] Marks v. City of Battle Creek, 358 Mich. 114, 99 N.W.2d 587 (1959).

[15] Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Seagood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936); Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41 (1949).

tary function. Generally, a showing that the city maintains the airport for profit is sufficient to overcome a defense of municipal immunity.[16] Furthermore, statutes authorizing cities to operate airports do not always grant municipal immunity from liability for torts in connection with such operations,[17] even where the statute defines the operation as governmental.[18] These courts take cognizance of the legislative authorization for cities to operate airports as "public and governmental" functions,[19] but state that such legislative pronouncements are only emblematic of an intent to constitutionally authorize the use of general tax funds for such purposes[20] or to declare such a function for the public purpose,[21] rather than an intent to grant municipal tort immunity.

Perhaps the most persuasive rationale for the establishment of municipal liability with respect to airport operation can be found in those cases which uphold liability by way of analogy. The courts in these cases recognize that school houses, city jails, and firehouses are generally held to be instrumentalities for governmental purposes, but that no such rule applies to other buildings constructed by a municipality, though the latter buildings were constructed for the benefit, convenience, or advantage of its people.[22] These courts conclude that airports fall naturally into the same classification as such public utilities as electric light, gas, water, and transportation systems, which are universally classified as proprietary in nature.[23] Perhaps the nearest analogy is found in cases dealing with municipal docks and wharves.[24] A leading case, *Dysart v. City of St. Louis,* [25] imposed liability by way of analogy, holding: "An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves, and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air."[26] The analogy is persuasive in the instance where a municipal corporation maintains a public wharf and charges a toll or wharfage to the owners of vessels making use of the wharf. In such a situation the municipality has been held liable to the same extent as an individual wharfowner.[27]

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16 Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S.E.2d 126 (1952).

17 Behnke v. City of Moberly, 243 S.W.2d 549 (Mo. 1951).

18 Granite Oil Sec., Inc. v. Douglas County, 67 Nev. 388, 219 P.2d 191 (1950); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

19 Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957); Granite Oil Sec., Inc. v. Douglas County, 67 Nev. 388, 219 P.2d 191 (1950); Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

20 Wendler v. City of Great Bend, 181 Kan. 753, 316 P.2d 265 (1957).

21 Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

22 Coleman v. City of Oakland, 110 Cal. App. 715, 295 P. 59 (Dist. Ct. App. 1930).

23 City of Mobile v. Lartrigue, 23 Ala. App. 479, 127 So. 257 (1930).

24 U.S. Trucking Corp. v. City of New York, 14 F.2d 528 (E.D.N.Y. 1926); City of Jeffersonville v. Gray, 165 Ind. 26, 74 N.E. 611 (1901); Harris v. City of Bremerton, 85 Wash. 64, 147 P. 638 (1915).

25 321 Mo. 514, 11 S.W.2d 1045 (1928).

26 *Id.* at 520, 11 S.W.2d at 1049.

27 U.S. Trucking Corp. v. City of New York, 14 F.2d 528 (E.D.N.Y. 1926); City of Jeffersonville v. Gray, 165 Ind. 26, 74 N.E. 611 (1901); Harris v. City of Bremerton, 85 Wash. 64, 147 P. 638 (1915).

The decisions which find municipal liability in the maintenance and operation of an airport, because the municipality is performing a proprietary function, have recognized that differing standards should not exist merely because travel is now exercised by passage through the air.[28] In contrast to the decisions finding immunity, these courts allowing recovery against the city have generally come to the realization that an airport is an incident of transportation, and in operating an airport the municipality is engaged in a purely corporate capacity, a capacity which disallows immunity from liability.[29]

II. The Effect of Obtaining Public Liability Insurance

Thus far in this Note, the liability of a municipality in the maintenance and operation of an airport has been discussed from the framework of distinctions as to the governmental or proprietary nature of the function. However, there is some support, notably in Tennessee, for the contention that by obtaining a public liability insurance policy, a city can effectively waive its immunity from tort liability.[30] The Tennessee cases[31] on the subject indicate that ordinarily a Tennessee municipality is not answerable for the torts of its agents in airport maintenance and operation (pursuant to state statute),[32] but a long line of Tennessee cases holds that liability of a municipality may be imposed to the extent of the insurance coverage at the time of the accident.[33] Supporting its decision that the city had waived immunity, the Tennessee court stated:

> The trend of these decisions is that a defendant and its insurance carrier are liable to the injured party, although the defendant would not be liable unless it carried the liability insurance. It would be an entirely useless gesture and waste of public funds for a municipality to carry liability insurance to protect it in tort actions incurred in connection with its governmental acts if it were required to plead and set up governmental immunity as a defense. The more equitable rule, sanctioned by reason and common sense, would be to permit plaintiff to plead and prove that defendant carried liability insurance; then limit the judgment to such coverage.[34]

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28 City of Mobile v. Lartrigue, 23 Ala. App. 479, 127 So. 257 (1930).

29 *Id.*

30 City of Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955).

31 Stocker v. City of Nashville, 174 Tenn. 483, 126 S.W.2d 339 (1939); Thornton v. Carrier, 43 Tenn. App. 615, 311 S.W.2d 208 (1957).

32 Tenn. Code Ann. § 42-326 (1964) provides in part:

> "The . . . establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection, and policing of airports . . . are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; . . . No action or suit shall be brought or maintained against any municipality, or its officers, agents, servants or employees, in or about the construction, maintenance, operation, superintendence, or management of any municipal airport."

33 Travelers Ins. Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d 142 (1943); Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936); City of Kingsport v. Lane, 35 Tenn. App. 183, 243 S.W.2d 289 (1951); Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (1945).

34 Williams v. Town of Morristown, 32 Tenn. App. 274, 291, 222 S.W.2d 607, 614 (1949).

The rule laid down by the Tennessee courts and followed by the federal court in Tennessee and by the Court of Appeals for the Sixth Circuit has little, if any, support elsewhere.[35] A general review of the authorities on the question of tort liability of government agencies points out that (1) some states have enacted laws creating a primary liability on the part of governmental agencies and have authorized the purchase of insurance to protect the agency in the event of loss;[36] (2) other states have empowered the agency to procure liability or indemnity insurance by providing that either the action shall be brought directly against the insurance carrier,[37] or the liability of the insurer shall be determined by a judgment obtained by the injured person against the agency;[38] and (3) in one state, Tennessee, where the statutes authorize the agency to carry liability insurance, the agency is liable provided the judgment is limited to the extent of insurance coverage.[39]

The vast majority of the states[40] contend that governmental immunity from liability for torts rests upon a much broader base than the mere absence of funds with which to pay such losses, this immunity being a fundamental and long established rule of the common law in those jurisdictions.[41] The numerous cases throughout the United States, contrary to the Tennessee rule, represent the conclusion that the common law rule of governmental tort immunity is not waived by a municipal corporation merely because it possesses liability insurance. Accordingly, the immunity of the municipality in connection with the airport is preserved.[42]

III. The Iowa Position

A. *Development*

Historically, although municipal airport maintenance and operation in Iowa has been considered a governmental function and hence immune from liability,[43] the Iowa approach in determining the liability of this function is

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[35] Although the vast majority of jurisdictions have held that the possession of liability insurance does not amount to a waiver of immunity, most state statutes now authorize the purchase of liability insurance covering specific immune governmental acts. But absent such authorization, the courts have held the purchase of insurance to be ultra vires. *See* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 Duke L.J. 588, 595.

[36] Hummer v. School City of Hartford City, 124 Ind. App. 30, 112 N.E.2d 891 (1953).

[37] Earl W. Baker & Co. v. Lagaly, 144 F.2d 344 (10th Cir. 1944).

[38] Taylor v. Knox County Bd. of Educ., 292 Ky. 767, 167 S.W.2d 700 (1942).

[39] Travelers Ins. Co. v. Dudley, 180 Tenn. 191, 173 S.W.2d 142 (1943); Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936); City of Kingsport v. Lane, 35 Tenn. App. 183, 243 S.W.2d 289 (1951); Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (1945).

[40] Rittmiller v. School Dist. No. 84, 104 F. Supp. 187 (D.C. Minn. 1952); Burns v. American Cas. Co., 127 Cal. App. 2d 198, 273 P.2d 605 (Dist. Ct. App. 1954); Hummer v. School City of Hartford City, 124 Ind. App. 30, 112 N.E.2d 891 (1953); Price State Highway Comm'n, 62 Wyo. 385, 167 P.2d 309 (1946).

[41] Hummer v. School City of Hartford City, 124 Ind. App. 30, 112 N.E.2d 891 (1953).

[42] For the effect of insurance coverage in Iowa *see* note 63 *infra*.

[43] Abbott v. Des Moines, 230 Iowa 494, 298 N.W. 649 (1941).

this section, it can be persuasively argued that section two imposes total liability on the municipality for its own torts and those of its officers, employees, and agents acting within the scope of their employment or duties.[64] Pursuant to the language of this act, it is no longer of crucial importance in Iowa whether or not municipal airport maintenance and operation constitutes a governmental or proprietary function, since the enactment imposes liability on the municipality in either case. The act thus supersedes the Iowa cases declaring municipal immunity in the maintenance of public parks by reason of the governmental nature of the function.[65] These cases had been expressly relied upon when the Iowa supreme court held a municipality immune from liability in the maintenance and operation of a municipal airport.[66] Furthermore, it can be argued that the Iowa Municipal Tort Claims Act[67] has not only eradicated much of the confusion which is the result of the conflicting Iowa case law in this area, but also has codified the recent trend of Iowa cases which has denied immunity to a municipality in the operation of a public park.[68] Since by statute municipal liability in the maintenance and operation of an airport is governed by the same standards as those with respect to municipal liability in connection with public parks,[69] the practitioner is justified in having little doubt that Iowa has now joined the majority of states which allows recovery against a municipality in the maintenance and operation of a municipal airport.

IV. Conclusion

Text writers and jurists have expressed bewilderment that this country should adopt the doctrine of sovereign immunity (of which municipal immunity is an outgrowth) particularly in view of the history of this nation, where sovereign power resides in the people and where rights of individuals against the state are fundamental legal principles.[70] Nevertheless, in light of the de-

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lection of taxes; (3) any claim that is based upon an act or omission of an officer or employee exercising due care, in the carrying out of a statute, ordinance, or officially adopted resolution, rule, or regulation of a governing body; and (4) any claim against a municipality as to which the municipality is immune from liability by reason of any other statute or where the action is based upon a claim that has been barred or abated by operation of statute or rule of civil procedure. However, section seven of the Iowa Municipal Tort Claims Act provides that the procurement of liability insurance constitutes a waiver of the defense of governmental immunity as to those exceptions listed in section four of the Act, to the extent of the insurance coverage. It should be pointed out that the Iowa supreme court (prior to the adoption of the Iowa Municipal Tort Claims Act) stated in McGrath Bldg. Co., Inc. v. Bettendorf, 248 Iowa 1386, 85 N.W.2d 616 (1957), that it could find no justification to enlarge the liability of the city or town which purchased liability insurance. Nevertheless, the effect of this decision appears to be somewhat diminished in light of section seven of the Act.

64 Ch. 405, § 2, [1967] Iowa Acts 794.

65 Smith v. City of Iowa City, 213 Iowa 391, 239 N.W. 29 (1931); Hensley v. Incorporated Town of Gowrie, 203 Iowa 388, 212 N.W. 714 (1927); Norman v. City of Chariton, 201 Iowa 279, 207 N.W. 134 (1926).

66 Abbott v. Des Moines, 230 Iowa 494, 298 N.W. 649 (1941).

67 Ch. 405, [1967] Iowa Acts 793.

68 Cox v. Des Moines, 233 Iowa 272, 7 N.W.2d 32 (1943).

69 Iowa Code § 330.15 (1966).

70 Stason, *Governmental Tort Liability Symposium*, 29 N.Y.U.L. Rev. 1321 (1954), citing Dalehite v. United States, 346 U.S. 15 (1953); Borchard, *Government Responsi-*

cisions involving municipal maintenance and operation of airports, it is apparent that in this area the doctrine of municipal immunity still exists in several states. Airports are said to be as important to commerce as are terminals to railroads or harbors to navigation.[71] The possession of an airport by a modern city is essential if it desires opportunities for increased prosperity.[72] It is truly an anomaly in the law that some courts allow the municipality to reap the enormous benefits from maintaining and operating an airport and yet through the invocation of the doctrine of municipal immunity allow the municipality to escape the burdens of such a function.[73] The majority of states which deny immunity to a municipality in the maintenance and operation of an airport on the basis that such a function is proprietary in nature present an enlightened approach in this area of the law. The Iowa position may well present an even more enlightened view in that it allows compensation for one injured through the tortious conduct of the city without regard to the governmental or proprietary nature of the function[74] thereby avoiding the problems and confusion which courts encounter when attempting to apply the divergent rules which govern the distinction.

A survey of the general status of the law with respect to the liability of a municipality in the maintenance and operation of an airport reveals a curious patchwork of responsibility and immunity.[75] The states left with partial tort liability of municipalities should adopt a stricter and more complete rule of responsibility, because considerations of fair play and justice suggest that those injured by the negligence of a municipality or its agents should be compensated on equal terms with those injured by individuals or private corporations.[76]

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bility in Tort, V, 36 YALE L.J. 757 (1927), and Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924).

71 City of Wichita v. Clapp, 125 Kan. 100, 263 P. 12 (1928).

72 *Id.*

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

74 Ch. 405, § 2, [1967] Iowa Acts 794.

75 James, *Tort Liability of Government Units and Their Officers*, 22 U. CHI. L. REV. 610 (1954).

76 Kirksey v. City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957).

Case Notes

Civil Rights—Federal District Court Has Jurisdiction Under Reconstruction Civil Rights Acts to Enjoin Human Rights Demonstrators from Interfering with Church Services—*Gannon v. Action* (E.D. Mo. 1969).

On four Sundays in June and July 1969, defendants, members of Action, a voluntary unincorporated association, entered the Roman Catholic Cathedral in St. Louis, Missouri, to read a list of demands and to disrupt church services. Plaintiffs, the pastor and members of the congregation, brought this action to enjoin further demonstrations. *Held*, the district court had jurisdiction under 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) to grant a preliminary injunction.[1] *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969).

In the summer of 1969 members of Action and the Black Liberation Front conducted demonstrations in several churches in the St. Louis area. In the demonstrations at the Roman Catholic Cathedral the members of Action entered the church dressed in black pants and sweatshirts; some were naked to the waist. They stated that the demonstrations would last for six months, occurring without warning. They threatened to use symbolic gestures such as spitting in the communion cup and taking the holy bread to distribute to the black poor. Their demands, which were also addressed to the Episcopal and Lutheran churches, were that all property be made public; that the church act as a non-profit bonding agency for blacks; that the churches publicly discipline police who fired at black fleeing suspects; that the church remove its investments from industries which practice discrimination; that 75% of the church's receipts be turned over to Action; and that a clergyman be removed from the St. Louis Housing Authority Board and be replaced by a black male rent strike tenant. During the demonstrations, those inside the church were in communication with others outside by walkie-talkie. On one occasion the service was cancelled, and on another the police were called to remove the demonstrators, but there was no serious violence.

The Reconstruction Civil Rights Acts, originally enacted between 1866 and 1871, have recently been widely used to combat racial discrimination against Negroes.[2] In this case, the court used these acts to protect the church

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[1] A permanent injunction was granted in December 1969, and the case went on appeal to the Eighth Circuit Court of Appeals and was subsequently dismissed. Gannon v. Action, No. 19917 (8th Cir. June 2, 1970).

[2] *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).