St. John's Law Review

Volume 28
Number 2 *Volume 28, May 1954, Number 2*

Article 17

Torts--Psychic Injury--Liability for Nonfeasance of State Officers (Williams v. New York, 204 Misc. 843 (Ct. Cl. 1953))

St. John's Law Review

TORTS — PSYCHIC INJURY — LIABILITY FOR NONFEASANCE OF STATE OFFICERS.—Plaintiff sought damages for the wrongful death of decedent resulting from fright, unaccompanied by physical impact, which was caused by the threats of a convict who had escaped because of the alleged negligence of New York State prison guards. In allowing a recovery, the Court of Claims *held* the state liable because of the failure of its agents to act affirmatively in the performance of a governmental function. *Williams v. New York,* 204 Misc. 843, 126 N.Y.S.2d 324 (Ct. Cl. 1953).

Until recently, New York, as a sovereign, was immune from liability for injuries resulting from the performance of its governmental or corporate functions.[1] In 1929, however, by statute, New York waived its immunity if liability arose from the "misfeasance or negligence" of its agents or employees.[2] Since the courts had strictly adhered to the specific terms of the statute,[3] it was broadened by amendment in 1939.[4] The state thenceforth assumed liability in accordance with the same rules of law applicable in litigation involving individuals or corporations.[5]

In view of this statutory extension of governmental liability, it was held that the immunity of sovereign instrumentalities, whether they be private institutions [6] or municipal corporations,[7] could no

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[1] Smith v. New York, 227 N.Y. 405, 125 N.E. 841 (1920); Locke v. New York, 140 N.Y. 480, 35 N.E. 1076 (1894); Lewis v. New York, 96 N.Y. 71 (1884).

[2] Laws of N.Y. 1929, c. 467. "The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as applied to an action in the supreme court against an individual or corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the *misfeasance or negligence* of the officers or employees of the state while acting as such officer or employee." (emphasis added).

[3] See, *e.g.,* Hinds v. New York, 264 N.Y. 525, 191 N.E. 547 (1934).

[4] Laws of N.Y. 1939, c. 860; N.Y. CT. CL. 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."

[5] It must be noted, however, that the immunity of the sovereign had extended to claims based on the militia's negligence. In Newiadomy v. New York, 276 App. Div. 59, 93 N.Y.S.2d 24 (3d Dep't 1949), the court stated that although the state agreed to be sued, it only recognized its liability in areas wherein the individual or corporation would be liable. Since no private citizen is responsible for raising a militia, no individual could be held liable for such a tort and therefore neither could the state. The individual's only recourse was to petition his state assemblyman or senator to submit a private bill authorizing an award covering the victim's loss. To remedy this situation, the legislature expressly gave the courts the power to hold the state liable for the negligence of the militia. Laws of N.Y. 1953, c. 343.

[6] Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 36 N.E.2d 617 (1941).

[7] Holmes v. County of Erie, 266 App. Div. 220, 42 N.Y.S.2d 243 (4th

longer be asserted. It was reasoned that, once the state consented to be liable, the subdivisions of the state, deriving their immunity from it, likewise became liable.[8] States and municipalities were apparently subjected to the same duty of care applicable to individuals and corporations. However, by reason of the intrinsic nature of a sovereign, responsibility cannot always be determined by the same rules that govern the activities of individuals and corporations.

In the state's performance of a corporate function, the general rules of negligence are applied. The sovereign, or a subdivision thereof, has been held liable for negligence of commission or omission in the maintenance of highways,[9] pools,[10] parks [11] and sidewalks,[12] as well as in the operation of schools [13] and subways.[14] Recovery has also been allowed where the state's agents have injured persons or property while *performing* a governmental function.[15] The state has also been held liable for the death or injuries of persons assaulted by police officers,[16] and for injuries resulting from the negligent maintenance of a firehouse.[17]

The courts have hesitated, however, to hold the sovereign liable for its *failure* to act in its governmental capacity. Although the general rules of care and duty have been applied in several decisions, new criteria have been introduced. In decisions such as the instant case, liability for failing to perform a governmental function was imposed on the sovereign.[18] Yet, where the state failed to perform a function

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Dep't 1943), *aff'd mem.*, 291 N.Y. 798, 53 N.E.2d 369 (1944); *see* Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945); Steitz v. City of Beacon, 295 N.Y. 51, 54, 64 N.E.2d 704, 705 (1945); Koeppe v. City of Hudson, 276 App. Div. 443, 445, 95 N.Y.S.2d 700, 702 (3d Dep't 1950).

[8] See Steitz v. City of Beacon, *supra* note 7 at 54, 64 N.E.2d at 705; Holmes v. County of Erie, *supra* note 7 at 221-222, 42 N.Y.S.2d at 244-245.

[9] Canepa v. New York, 306 N.Y. 272, 117 N.E.2d 550 (1954); Nuss v. New York, 301 N.Y. 768, 95 N.E.2d 822 (1950); Trimble v. City of New York, 275 App. Div. 169, 88 N.Y.S.2d 324 (2d Dep't 1949).

[10] Fedearowicz v. City of Amsterdam, 293 N.Y. 814, 59 N.E.2d 178 (1944).

[11] Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E.2d 441 (1952).

[12] *See* Gordon v. City of Albany, 278 App. Div. 233, 236, 104 N.Y.S.2d 736, 739-740 (3d Dep't 1951); see also Berkson v. Village of Richfield Springs, 300 N.Y. 720, 92 N.E.2d 59 (1950); Loughran v. City of New York, 298 N.Y. 320, 83 N.E.2d 136 (1948).

[13] Steele v. Board of Education, 127 N.Y.L.J. 1253, col. 1 (Sup. Ct. Mar. 28, 1952).

[14] Mezzotero v. City of New York, 270 App. Div. 849, 60 N.Y.S.2d 619 (2d Dep't 1946).

[15] Warner v. New York, 279 N.Y. 395, 79 N.E.2d 459 (1948); Saari v. New York, 282 App. Div. 526, 125 N.Y.S.2d 507 (3d Dep't 1953); Ritter v. New York, 204 Misc. 300, 122 N.Y.S.2d 334 (Ct. Cl. 1953).

[16] Ferguson v. City of New York, 303 N.Y. 936, 105 N.E.2d 628 (1952); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947); McCarthy v. City of Saratoga Springs, 269 App. Div. 469, 56 N.Y.S.2d 600 (3d Dep't 1945).

[17] Williams v. City of New York, 57 N.Y.S.2d 39 (Sup. Ct. 1945).

[18] Williams v. New York, 204 Misc. 843, 126 N.Y.S.2d 324 (Ct. Cl. 1953); Liddie v. New York, 190 Misc. 347, 75 N.Y.S.2d 182 (Ct. Cl. 1947).

arising out of a duty owing to the general public, in contradistinction to the duty owing to individuals, as not providing police [19] or fire protection,[20] or where public policy is best served by refusing to allow a recovery,[21] it has not been held liable. These decisions appear to have been prompted by the fear of imposing on the state or municipalities crushing liability, and the resultant cessation of essential governmental services. The rights of an injured party are thus limited, so that these essential services may still be provided without overburdening the taxpayer.

It is curious to note that the Court, in the instant case, did not allow the state to escape liability under the rule of *Mitchell v. Rochester Railway*.[22] There, recovery was denied because the injury was caused merely by a psychic stimulus, unaccompanied by *immediate* physical injury. The court, in assuming that no physical impact had occurred, permitted a recovery, notwithstanding an unaccounted-for period of forty-five minutes.[23] If time had elapsed between the fright and the injury which resulted in death, the case would not fall under any of the recognized exceptions to the *Mitchell* decision.[24] Nor was the state permitted to escape liability under the principle laid down in *Cook v. Village of Mohawk*,[25] where the reaction to the stimulus was merely idiosyncratic. The decedent, in the principal case, being subject to hypertension and diabetes, died of a subarachnoid hemorrhage. The uncontradicted medical testimony showed that the hemorrhage was induced by fright. Thus, it would appear that the instant decision is inconsistent with the *Cook* case.

Although this decision does not extend a sovereign's liability into areas of *negligent omission* in the performance of a governmental function, it does show a tendency of the Court of Claims to favor the innocent victim in a situation where a doubt must be resolved. Thus, had the Court found that the psychic injury occurred immediately

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[19] Murrain v. Wilson Line, Inc., 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946), *aff'd mem.*, 296 N.Y. 845, 72 N.E.2d 29 (1947); Schuster v. City of New York, 121 N.Y.S.2d 735 (Sup. Ct. 1953).

[20] Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); see H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (failure of independent contractor, employed by city, to furnish sufficient water pressure).

[21] See Steitz v. City of Beacon, *supra* note 20; St. George v. New York, 283 App. Div. 245, 127 N.Y.S.2d 147 (3d Dep't 1954); Murrain v. Wilson Line, Inc., *supra* note 19. In cases involving treatment accorded inmates of mental institutions, the courts have hesitated in imposing liability. This caution stems from a desire not to return to high fences and steel bars as a preventive measure for occasional elopements by trusties. To hold the state liable in cases such as Excelsior Ins. Co. v. New York, 296 N.Y. 40, 69 N.E.2d 553 (1946), would seriously hinder modern trends in the psychiatric rehabilitation of these inmates.

[22] 151 N.Y. 107, 45 N.E. 354 (1896).

[23] *See* Williams v. New York, 204 Misc. 843, 844-845, 126 N.Y.S.2d 324, 326 (Ct. Cl. 1953).

[24] See McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 32 (1949).

[25] 207 N.Y. 311, 100 N.E. 815 (1913).

upon the entry of the escaped convict into the decedent's truck, a recovery would have been allowed under a recognized exception to *Mitchell v. Rochester Railway,* that is, immediate physical injury.[26] On the other hand, had the injury occurred at any subsequent time within the unaccounted-for forty-five minute period, recovery would have been denied. But whether liability was imposed because the injury was immediate or whether a new exception has been added to the *Mitchell* rule does not clearly appear.

It is submitted that the Court should limit the immunity of the state when liability arises from a breach of the aforementioned concept of duties owed to the general citizenry, for which no liability is imposed, by allowing recovery where a foreseeable harm to a particular individual or group of individuals is involved.

One of the primary reasons for requiring immediate physical injury to permit recovery for psychic injury was to discourage litigation of unfounded claims where there existed a lack of evidence showing a causal relationship between the act complained of and the injury itself. However, with the recent advancements in medico-legal processes, the evidentiary obstacles may be more easily surmounted. It would appear, therefore, that the courts should abandon the requirement of immediate physical injury where the stimulus is only psychic in nature.

WILLS — INCLUSION OF TOTTEN TRUST IN TESTAMENTARY DISPOSITION DEEMED CONFIRMATION.—Testator opened a bank account in his own name in trust for his secretary. The same account was later bequeathed to the secretary. The widow, exercising her right of election, sought contribution from the bank account, claiming it to be part of the estate under the will. The Surrogate *held* that the bank account is not subject to the widow's right of election because the will was a confirmation of the trust, not a revocation. *Matter of Phipps,* 125 N.Y.S.2d 606 (Surr. Ct. 1953).

In 1904, the celebrated case of *Matter of Totten* upheld the validity of a deposit ". . . by one person of his own money, in his own name as trustee for another. . . ." [1] Such a deposit, commonly referred to as a Totten trust, is tentative in nature. It does not become absolute until the gift is completed during the depositor's lifetime by

[26] Mundy v. Levy Bros. Realty Co., 184 App. Div. 467, 170 N.Y. Supp. 994 (2d Dep't 1918); Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914).

[1] 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904). See the discussion of these trusts in 1 SCOTT, TRUSTS 360 (1939).