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# Torts--Negligence of Police Officer--Municipal Immunity Limited by Statute--Construction (Berger v. City of New York, 260 App. Div. 402 (2d Dep't 1940))

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tion, it follows that unrealized appreciation may constitute a proper source from which dividends may be declared.[22]

P. C.

TORTS—NEGLIGENCE OF POLICE OFFICER—MUNICIPAL IMMUNITY LIMITED BY STATUTE—CONSTRUCTION.—Plaintiff's intestate, while lawfully on a public street in New York City, was killed as a result of injuries received when a commandeered automobile, negligently operated by a municipal police officer in the pursuit of suspicious characters who were fleeing from the officer, ran into the decedent and his pushcart. This action was brought against the City of New York and other defendants to recover damages for the death. Trial Term dismissed the plaintiff's complaint against the City of New York. On appeal, *held,* the judgment at Trial Term unanimously affirmed. *Berger* v. *City of New York,* 260 App. Div. 402, 22 N. Y. S. (2d) 1006 (2d Dept. 1940).

No recovery can be had on common law principles against a municipal corporation for the torts of policemen or other municipal appointees whose duties are undertaken in the fulfillment by the municipal corporation of its governmental as distinguished from its corporate functions.[1] The plaintiff-appellant contended that he has a remedy under Section 50-a of the General Municipal Law,[2] which is

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[22] Plaintiff further contended that it was improper not to "write down" to actual value on the company's books the cost of investments in and advances to subsidiaries and thereby fail to take unrealized depreciation into account. Thus, plaintiff took the inconsistent position by arguing that investments and advances must be taken at their actual value, whereas fixed assets are to be considered only at cost. In short, the directors should have taken unrealized depreciation into account, while unrealized appreciation should have been disregarded. The patent inconsistency of this position was resolved by the court by stating: "that the same reasons which show that unrealized appreciation must be considered are equally cogent in showing that unrealized depreciation must be considered. In other words, the test being whether or not the *value* of the assets exceeds the debts and the liability to stockholders, *all* assets must be taken at their *actual value.*" However, although plaintiff's position was correct as to these investments and advances and also with respect to certain demolished properties which should have been written off and not considered in computing the amount of surplus, even if all these deductions claimed by the plaintiff were allowed in full, the actual value of the land and improvements at all times during the period in question exceeded the book value thereof by an amount sufficient to show a surplus greater than the amount of the dividends.

[1] Maximilian v. Mayor, etc., of City of New York, 62 N. Y. 160 (1875); Woodhull v. Mayor, etc., of City of New York, 150 N. Y. 450, 44 N. E. 1038 (1896); Lefrois v. County of Monroe, 162 N. Y. 563, 57 N. E. 185 (1900); Wilcox v. City of Rochester, 190 N. Y. 137, 82 N. E. 1119 (1907); Lacock v. City of Schenectady, 224 App. Div. 512, 231 N. Y. Supp. 379 (3d Dept. 1928); Duren v. City of Binghamton, 172 Misc. 580, 15 N. Y. S. (2d) 518 (1939), *aff'd,* 258 App. Div. 694, 18 N. Y. S. (2d) 518 (3d Dept. 1940).

[2] Formerly N. Y. HIGHWAY LAW § 282-g.

one of three sections [3] in which the legislature attempted to eliminate the immunity based upon "governmental function" by granting a remedy against "sovereign irresponsibility" in certain cases of accidents arising out of the operation of municipal vehicles. An important test of whether a remedial statute is in derogation of the common law has been to ask whether or not it creates a liability where none previously existed.[4] The sections on which the plaintiff relies are remedial in that they give a remedy where none previously existed, but, because they actually do afford hitherto unknown relief, they are in derogation of the common law and must be strictly construed.[5] Thus does the phrase "municipally owned" conclude the plaintiff.

If the basis of the municipal immunity is, as the courts have said,[6] the fact that there has been a delegation of his duties to the officer by the state directly or the fact that the municipality is merely the means the state employs to maintain forces of officers, this question arises: does the plaintiff have a remedy against the state in the Court of Claims under what was, at the time of the accident, Section 12-a [7] of the Court of Claims Act? That section expressly constituted a waiver of the state's "immunity from liability for the torts of its officers and employees." [8]

The question of the liability of the state in the Court of Claims for the tort of a municipal police officer has apparently never been presented. If the test for liability of the state is, as the case of *Sears* v. *State* [9] seems to indicate, that the cost of the undertaking in which the tort was committed be met out of the state treasury, then the state is not liable, for the state does not defray the cost of municipal police departments. If, however, the case of *Paige* v. *State* [10] represents the

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[3] N. Y. GEN. MUNICIP. LAW §§ 50-a–50-c.

[4] CURTIS, STATUTES AND STATUTORY CONSTRUCTION (1916) §§ 146, 153; 1 McKINNEY, CONSOLIDATED LAWS OF NEW YORK 39.

[5] Leppard v. O'Brien, 225 App. Div. 162, 164, 232 N. Y. Supp. 454, 456 (3d Dept. 1929), *aff'd*, 252 N. Y. 563, 170 N. E. 144 (1929); Miller v. Town of Irondequoit, 243 App. Div. 240, 241, 276 N. Y. Supp. 497, 499 (4th Dept. 1935).

[6] Maximilian v. Mayor, etc., of City of New York, 62 N. Y. 160 (1875); Woodhull v. Mayor, etc., of City of New York, 150 N. Y. 450, 44 N. E. 1038 (1896); Lacock v. City of Schenectady, 224 App. Div. 512, 231 N. Y. Supp. 379 (3d Dept. 1928).

[7] N. Y. CT. CL. ACT §§ 8, 9(2).

[8] Former N. Y. CT. CL. ACT § 12-a; Jackson v. State, 261 N. Y. 134, 184 N. E. 735 (1933); American Engineering Co. v. State, 153 Misc. 528, 273 N. Y. Supp. 853 (1934); Green v. State, 160 Misc. 398, 290 N. Y. Supp. 36 (1936).

[9] 152 Misc. 32, 272 N. Y. Supp. 694 (1934), *rev'd*, 245 App. Div. 901, 282 N. Y. Supp. 492 (3d Dept. 1935), *aff'd*, 270 N. Y. 579, 1 N. E. (2d) 339 (1936).

[10] 269 N. Y. 352, 199 N. E. 617 (1936). The Court of Appeals held the state liable in the Court of Claims for a tort upon the person of an inmate of a private charitable reformatory, to which the inmate had been committed by a police court, upon the theory that the negligence of those in charge of the institution was a tort of officers and employees of the state acting as such. The court said, "To exalt that circumstance [that the public moneys expended did not come out of the state treasury] to a ground of distinction in itself would be

view which the Court of Appeals will take when the problem (involving torts of police officers) is ultimately presented, the result will be that the state will be held liable. The latter eventuality would seem to be the prospect in view of the prevailing trend away from the municipal immunity.[11] At any rate, plaintiffs in such cases as this are not altogether without hope of remedy. The Board of Estimate of the City of New York may, in its discretion, make an award for personal injuries or death caused by a police officer.[12]

L. D. V.

TRAFFIC INFRACTION—PRIMA FACIE CASE OF UNLAWFUL PARKING.—On fifteen different occasions an automobile, of which the defendant was the registered owner, was found by police officers to have been parked continuously for more than one hour in a congested, business or residential street of New York City. Each of these occurrences constituted a violation of a regulation adopted and promulgated by the police commissioner. The district attorney prosecuted these traffic infractions in the Magistrates' Court. The defendant, in per-

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unnecessarily to blunt the beneficient [*sic*] purpose of the waiver by the State of its immunity."

[11] Duren v. City of Binghamton, 172 Misc. 580, 15 N. Y. S. (2d) 518 (1939), *aff'd*, 258 App. Div. 694, 18 N. Y. S. (2d) 518 (3d Dept. 1940).

[12] N. Y. CITY ADMIN. CODE § 93d—3.0. The history of this section is most interesting. New York City Local Law No. 13 of 1927 empowered the Board of Estimate and Apportionment in its discretion to "make an award to a person who has been or hereafter shall be injured by a police officer while such officer is engaged in arresting any person or in retaking any person who has escaped from legal custody or in executing any legal process." Until after the death had occurred in the case at bar, this law remained unchanged. It was held constitutional in *Matter of Evans* v. *Berry*, 262 N. Y. 61, 186 N. E. 203 (1933), in which the court said: "The fact that the statute applies to persons receiving injuries prior to its enactment is no objection to its validity." In 1934, by New York City Local Law No. 16, § 246-a of the Greater New York Charter prevailing at that time was adopted, and it extended the power of the Board of Estimate and Apportionment to include cases of death caused by police officers under the same circumstances as those set forth in Local Law No. 13 of 1927. Up to that time personal injuries exclusive of death had been covered by the statute. The 1934 amendment further extended the power of the Board to make awards in cases of death or injury caused by police officers while engaged in endeavoring to make arrests. However, it required a unanimous vote of the Board of Estimate as a condition to any award and in place of the words "in its discretion," it used the words "as a matter of grace and not as a matter of right." Except for a minor amendment to § 246-a of that Charter by New York City Local Law No. 7 of 1936, which is not material to the present discussion, the enactment remained unchanged until after the adoption of the latest Charter in 1936. The new Charter contains no provision dealing with this matter. But the Administrative Code of 1937 (Laws of 1937, c. 929), § 93d—3.0, as amended by New York City Local Law No. 30 of 1939, provides that the Board of Estimate, by a unanimous vote when the public interest will best be served, may make an award against the city or any agency (of the city) upon any claim certified by the comptroller to be equitable, but illegal or invalid.